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# Fear of the Queer Child

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# Fear of the Queer Child

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## INTRODUCTION

This Article is about the fear of the queer child. The simplest version of this fear is the claim that exposing children to homosexuality will "turn" them into homosexuals,[1] but the fear is more refined, varied, and capacious than this terminology suggests. It includes the fears that exposing children to homosexuality and gender variance will make them more likely to develop homosexual desires, engage in homosexual acts, form homosexual relationships, deviate from traditional gender norms, or identify as lesbian, gay, bisexual, or transgender. In one form or another, these are all fears of the queer child.

As historian David Halperin writes: "We can only defuse these fears if we are willing to analyze them, to understand them, to figure out where they come from, what their institutional basis is, and—perhaps most important of all—how they are connected systematically to the social and discursive structures that organize our culture."[2] Taking up Halperin's call, this Article historicizes the fear of the queer child in an attempt to dispel it. The Article shows that although the fear of the queer child is thousands of years old, it has been subtly transformed in the last fifty years. For centuries, the fear had been articulated almost exclusively in terms of *seduction*—as the claim that children could be sexually initiated into queerness by engaging in

1. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

2. David Halperin, *Deviant Teaching*, *in* A COMPANION TO LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER STUDIES 146, 166 (George E. Haggerty & Molly McGarry eds., 2007) [hereinafter Halperin, *Deviant Teaching*].

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homosexual activity with adults. Evidence of this belief can be found in many times and places, but it became an especially prominent social, legal, and political justification for anti-LGBT policies in the modern era.

During the 1970s, religious conservative opponents of LGBT rights reformulated the fear of the queer child in response to the rapid rise of the LGBT movement. Rather than falling back on the age-old fear that children could be seduced into queerness, the movement's opponents introduced more palatable claims of indoctrination, role modeling, and public approval into public debates over LGBT rights. The *indoctrination* fear is that LGBT adults will actively recruit and proselytize children into queerness, in a deliberate attempt to increase the population of LGBT people. The *role modeling* fear is that children will learn to imitate queerness by identifying with influential LGBT adults, such as parents and teachers. The *public approval* fear is that by granting equal rights to LGBT people, the government will teach children that queerness is acceptable—an "alternative lifestyle" that children should feel free to adopt.

Since the earliest days of the LGBT movement, advocates for LGBT rights have responded to these fears by claiming that they are empirically false—based upon myths, lies, and misunderstandings. They have insisted that sodomy laws have nothing to do with children, marriage laws have nothing to do with schools, and children raised by lesbian and gay parents are no different than children raised by heterosexual parents. Tying these claims together, LGBT advocates have argued that a child's sexual orientation and gender identity are fixed early in life and cannot be learned, taught, chosen, or changed.

The trouble with the LGBT movement's empirical response has long been apparent: it is defensive; worse still, it is apologetic. It attacks the factual premise that queerness *can* be contained, but it fails to challenge the normative premise that queerness *should* be contained.[3]

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3. *See* Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 473-74, 481 (2012) (arguing that opposition to gay rights is premised upon the goal of

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Like the immutability claim upon which it is based, this response amounts to an assurance that queerness is not contagious, rather than an assertion of an individual's equal liberty to be queer or straight.[4] Even if only for the purpose of argument, it entertains the troubling assumption that queerness is immoral, harmful, or inferior, and thus that the state may legitimately discourage children from being or becoming queer.

To be sure, this vice can also be viewed a virtue: by focusing on the empirical question of how children become queer, LGBT advocates have allowed both sides of the struggle over LGBT rights to save face,[5] by forestalling a normative debate about whether it is optimal or tolerable for more children to be queer. Advocates have calculated that in the current social, legal, and political climate, they can win more victories sooner by invoking empirical studies on children's sexual and gender development, rather than asking voters, judges, and politicians to celebrate the possibility that more and more children may become queer.

This Article examines how the struggle for LGBT rights arrived at this tactical impasse and identifies a paradigm for moving beyond it. If we do not learn the history of this fear, we may remain imprisoned within it—condemned to repeat our empirical claims to exhaustion, without confronting the premise that children are better off straight.

The Article has five parts. Part I provides a theoretical backdrop for my argument by defining how the Article uses the terms "fear," "queer," and "child." Parts II and III provide a brief historiography of the fear. Part II explores the fear's premodern origins and modern rise, while Part III examines the fear's reconceptualization in the contemporary period. This narrative sets the stage for the Article's

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"containment" and that advocates prefer to rebut this goal "with empirical rather than normative arguments").

4. *Cf.* Susan R. Schmeiser, *Changing Immutable*, 41 CONN. L. REV. 1495, 1520-21 (2009) (arguing that the immutability claim amounts to a plea for civil rights because "we can't help it").

5. William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1377-79, 1388-89 (2000).

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normative challenge in two ways. First, it establishes links among the opposition's claims of seduction, indoctrination, role modeling, and public approval, which might otherwise appear to be logically and historically distinct from each other.[6] By showing how kinder, gentler themes emerged from older, harsher claims about the sexual transmission of queerness, this history discredits the new by associating it with the old.[7] Second, this narrative helps explain why the LGBT movement has struggled so mightily to show that the fear of the queer child is empirically false. By explaining how the fear has flourished for so long, this history sheds light on the reasons that the LGBT movement has been so cautious and anxious about how to attack it.

Part IV indicates that the time may be ripe to consider new strategies because the LGBT movement's empirical strategy has begun to show signs of strain in recent years. While the fear of seduction has been debunked by legal and scientific authorities, the fears of indoctrination, role modeling, and public approval are still commonplace, and they seem less vulnerable to the LGBT movement's empirical challenges. After decades of studies, debates over children's sexual and gender development remain unsettled in significant respects, and they are not likely to be resolved in the foreseeable future. Rather than relying only on the claims that children cannot be influenced by teachers, parents, or the state, LGBT advocates should consider challenging the premise that children are better off straight.

Part V lays out a theoretical framework within which such a normative challenge could be developed. It begins by acknowledging that even in the days of Anita Bryant's "Save Our Children" campaign, there were already activists and scholars who asked, "*so what* if children grow up to be

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6. *Cf. Perry*, 704 F. Supp. 2d at 1003 (citing testimony of historian George Chauncey to place Proposition campaign advertisements about children turning homosexual into "historical context as echoing messages from previous campaigns to enact legal measures to disadvantage gays and lesbians").

7. *See* Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2179 (1996) (arguing that when a new movement successfully contests the justification for a status regime, the regime will "translate" the justification into more socially acceptable terms).

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queer?" Rather than claiming that children's sexual and gender development cannot be influenced, they have insisted that the possibility of children becoming queer is neither legally nor morally relevant. In the new millennium, this claim has been taken up by a handful of legal scholars, lawyers, and judges, reflecting a broader shift in cultural attitudes toward children's queerness. Borrowing from Lisa Duggan's *Queering the State*, this Part theorizes these new claims under the banner "No Promo Hetero."[8] It insists that the state must adopt a neutral position vis-à-vis children's straightness and queerness, because it has no legitimate reason to presume that straightness is superior to queerness—neither in childhood, nor at any age.

## I. NAMING THE FEAR

This Part briefly defines the terms "fear," "queer," and "child" in order to establish a conceptual framework for the historical and theoretical arguments that follow.

### A. *Fear*

For readers who are familiar with queer theory, this Article's title may call to mind *Fear of a Queer Planet*,[9] an anthology that has become one of the field's defining texts. This is no accident: by adopting the term "fear," this Article means to link the fear of the queer child to the broader prejudices against queerness, in which opponents of LGBT rights object to the spread of homosexuality and gender variance among people of all ages. In particular, the term "fear" signals that objections to the possibility of children's queerness are based on nothing more than a sense of apprehension or dread—a feeling of anxiety toward a possibility that is always already presumed to be harmful or dangerous.[10] To refer to such sophistry as an "argument," a

8. Lisa Duggan, *Queering the State*, 39 SOC. TEXT 1, 8-9 (1994).

9. FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY (Michael Warner ed., 1993).

10. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 458 (11th ed. 2003).

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"concern," or an "objection" would give too much credit to the fear's premises.

## B. *Queer*

In queer theory's founding text, *Epistemology of the Closet*, Eve Kosofsky Sedgwick argued that modern understandings of homosexuality have been characterized by "internal incoherence and mutual contradiction" along two axes.[11] The first contradiction is between "minoritizing" and "universalizing" views; the second is between "gender-transitive" and "gender-separatist" views.[12] This Article uses the term "queer" to indicate that although the fear of the queer child is riven by the same contradictions, it most often defines homosexuality in universalizing and gender-transitive terms.

1. *Universalizing*. First, the term "queer" signals that when opponents of LGBT rights articulate the fear of the queer child, they typically conceptualize homosexuality in *universalizing* terms: rather than conceding that "there is a distinct population of persons who 'really are' gay," they insist "that apparently heterosexual persons and object choices are strongly marked by same-sex influences and desires, and vice-versa for apparently heterosexual ones."[13] Instead of referring to the risk that children will "become" lesbian, gay, bisexual, or transgender, opponents of LGBT rights often speak of children being "confused," or "seduced," or "indoctrinated" into the "homosexual lifestyle."[14] In doing so, they present homosexuality as a temptation to which any child could potentially yield, rather than an innate or immutable characteristic of a "small, distinct, relatively fixed" group of children who "are," or may be properly identified as, lesbian, gay, bisexual, or transgender.[15]

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11. EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 1 (1990).

12. *Id*. at 1-2.

13. *Id*. at 85.

14. *See* Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 270 (1996).

15. SEDGWICK, *supra* note 11, at 1.

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Until recently, the universalizing view of homosexuality in childhood was so commonplace that the very notion of a "gay child" remained something of a paradox.[16] In her book *The Queer Child: Growing Sideways in the Twentieth Century*, queer theorist Kathryn Bond Stockton deftly traces the representation of children's gayness and strangeness through twentieth-century novels and films.[17] Situated within the fields of queer theory, literature, and film studies, Stockton's work offers the startling insight that before the new millennium, there had been few if any representations of gay children in legal or historical texts.[18] On the one hand, authorities maintained that children were presexual, and thus lacked a sexual orientation of any kind; on the other hand, they insisted that heterosexuality was the natural result of sexual development, a process through which any child could and should become heterosexual.[19] Within this framework, a child's homosexual desire or behavior could be nothing more than a passing phase—a bump on the road to heterosexual adulthood.

Stockton notes that since the millennium's turn, it has become increasingly commonplace to speak of "gay youth," "gay teens," and "gay adolescents,"[20] but references to the "gay child" are still exceedingly rare. More and more, gay adults are now willing to posit themselves as a gay child in the past tense—such as when one of Oprah Winfrey's guests says that "He Knew He Was Gay at Age 4."[21] Yet there are still few bona fide images of gay children in the present tense—identities asserted by the child herself, in the period prior to adolescence.[22]

As the LGBT movement has progressed, the boundary between childhood and adulthood has continued to function

16. Ruskola, *supra* note 14, at 280.

17. KATHRYN BOND STOCKTON, THE QUEER CHILD: GROWING SIDEWAYS IN THE TWENTIETH CENTURY (2009).

18. *See id*. at 9, 16, 19.

19. *See id*. at 7.

20. *Id.* at 10.

21. *Id.*

22. *Id.* at 7.

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as a fault line, providing opponents of LGBT rights with an all-purpose excuse for rejecting the movement's objectives. While many people have embraced a minoritizing view of homosexuality in adulthood, they have maintained a universalizing view of homosexuality in childhood.[23] In an essay provocatively titled *Straight Talk About Gays*, one psychologist explained: "Surely decency demands that those who find themselves homosexual be treated with dignity and respect. But surely, too, reason suggests that one guard against doing anything which might mislead wavering children into perceiving society as indifferent to the sexual orientation they develop."[24]

2. *Gender-Transitive.* In addition, the term "queer" indicates that opponents of LGBT rights typically conceptualize homosexuality in *gender-transitive* terms: rather than distinguishing sharply between children's sexuality and gender, they tend to conflate homosexuality with gender variance by presenting "same-sex object choice . . . as a matter of liminality or transitivity between genders."[25] By most accounts, the term "queer" incorporates people who are transgender—and more broadly, people who are gender variant—in addition to lesbians, gay men, and bisexuals.[26] By referring to the fear of the "queer" child,

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23. *See* Eve Kosofsky Sedgwick, *How To Bring Your Kids Up Gay*, 29 SOC. TEXT 18, 23 (1993) [hereinafter Sedgwick, *How To Bring Your Kids Up Gay*] ("There are many people in the worlds we inhabit, and these psychiatrists are unmistakably among them, who have a strong interest in the dignified treatment of any gay people who may happen already to exist. But the number of persons or institutions by whom the existence of gay people is treated as a precious desideratum, a needed condition of life, is small.").

24. E.L. Pattullo, *Straight Talk About Gays*, COMMENT. 22 (Dec. 1992); s*ee also* Joshua Dressler, *Gay Teachers: A Disesteemed Minority in an Overly Esteemed Profession*, 9 RUTGERS L.J. 399, 402 (1977) ("[A]lthough a majority of the public generally opposes such discrimination, it strongly favors discrimination when contact with youths is involved.") (citing a 1977 Gallup Poll finding that a majority of respondents favored laws protecting gay people from discrimination in employment, but more than two-thirds remained opposed to employing gay people as teachers).

25. SEDGWICK, *supra* note 11, at 1-2.

26. Lisa Duggan, *Making It Perfectly Queer*, 22 SOCIALIST REV. 1, 20 (1992) ("The notion of a 'queer community' . . . is unified only by a shared dissent from the dominant organization of sex and gender.").

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rather than the fear of the "gay" child, this Article signals that children's variance from traditional gender norms falls within the fear's ambit.[27]

As many scholars have observed, the conflation of the concepts of sex, gender, and sexual orientation is an old and pervasive habit.[28] This conflation is rarely more apparent than in discussions of childhood, where sexuality and gender are so "intimately entangled" that they can barely be distinguished.[29] In recent years, this tendency has become an increasingly common feature of anti-LGBT rhetoric: as the public's attitudes toward lesbian and gay people have improved, opponents of LGBT rights have pivoted toward a focus on protecting children from exposure to "men dressed as women," "drag queens," and "transgender activists."[30] In light of this trend, it would be both a moral and tactical failing to mount a normative defense of children's homosexuality without offering a parallel defense of children's gender-variance.

### C. *Child*

Stockton writes, "[i]f you scratch a child, you will find a queer, in the sense of someone 'gay' or just plain strange."[31] In law as in life, childhood is a slippery concept: the term "child" is used loosely to refer to infants, toddlers, and teenagers, and even a parent's offspring, who remains the

27. And because the phrase "heterosexual and gender-conformist" is a mouthful, I have adopted to term "straight" as the opposite of "queer." Queer theorists often use the term "heteronormativity" as an alternative to what I am calling "straightness." *See, e.g.*, Michael Warner, *Introduction* to FEAR OF A QUEER PLANET, *supra* note 9, at xxi. I prefer "straightness" and "straight," because they are more accessible and familiar to most readers.

28. *See generally* Francisco Valdes, *Queers, Dykes, Sissies, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995) (discussing the historic and pervasive conflation of sex, gender, and sexual orientation).

29. *See* SEDGWICK, *supra* note 11, at 20.

30. *See* discussion *infra* Part III.G.

31. STOCKTON, *supra* note 17, at 1.

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parent's "child" for life.[32] This Article does not attempt to navigate or resolve the ambiguities of who is and is not a "child" by dissecting data on the age of children's "sexual awakening,"[33] or specifying the moment at which a young person's sexual or gender development is complete. In this Article, the term "child" refers not to a person of any particular age, but rather to the idea of childhood—the fiction of the child that is reproduced by adults looking back upon an imagined past.[34] More than just vindicating a child's right to "come out" at any particular age,[35] it challenges the premise that children's queerness is harmful, immoral, or inferior. If the state has no legitimate interest in encouraging children's straightness or discouraging children's queerness,[36] then the questions of who counts as a "child" and who counts as "queer" are not especially relevant. As Stockton observes, the concept of the gay child illuminates the possibility that in one way or another, "any and *every* child" may be queer.[37]

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32. BLACK'S LAW DICTIONARY 239 (6th ed. 1994) (defining "child" and "children" to include "Progeny; offspring of parentage" and "Unborn or recently born human being," and observing that "[a]t common law one who had not attened the age of fourteen years, though the meaning now varies in different statutes"). *Cf.* STOCKTON, *supra* note 17, at 2 ("What a child 'is' is a darkening question."); *id*. at 16 ("The child is even defined as a kind of legal strangeness.").

33. *See, e.g*., Gilbert Herdt & Martha McClintock, *The Magical Age of 10*, *in* 1 SEXUAL HEALTH 183 (M.S. Tepper & A.F. Owens eds., 2007).

34. *See* STOCKTON, *supra* note 17, at 5; LEE EDELMAN, NO FUTURE: QUEER THEORY AND THE DEATH DRIVE 11 (2004) (describing the "child" as "the repository of variously sentimentalized cultural identifications"); LAUREN BERLANT, THE QUEEN OF AMERICA GOES TO WASHINGTON CITY 5 (1997) (arguing that "the most hopeful national pictures of 'life' circulating in the public sphere are not of adults in everyday life, in public, or in politics, but rather of the most vulnerable minor or virtual citizens—fetuses, children, real and imaginary immigrants—persons that, paradoxically, cannot yet act as citizens").

35. STOCKTON, *supra* note 17, at 3-4 ("Far from a simple, sentimentalized plea for children's rights to come out 'gay,' this book scouts the conceptual force of ghostly gayness in the figure of the child . . . .").

36. *See* Lofton v. Sec'y of Dep't of Children & Family Servs., 377 F.3d 1275, 1300 (11th Cir. 2004) (Barkett, J., dissenting) ("In our democracy, however, it is not the province of the State, even if it were *able* to do so, to dictate or even attempt to influence how its citizens should develop their sexual and gender identities.").

37. STOCKTON, *supra* note 17, at 2.

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## II. HISTORICIZING THE FEAR

Working from David Halperin's premise that we cannot dispel these fears until we understand them,[38] this Part offers a brief historiography of the fear of the queer child. It begins by offering a few examples of the fear's premodern origins, which anticipate several aspects of the fear's contemporary reincarnations. Next, it describes how the fear became one of the primary justifications for anti-LGBT policies in the modern era. In the early twentieth century, as the modern concepts of childhood and homosexuality were institutionalized, they were linked together in the new figure of the homosexual child molester, which became one of the century's leading villains. This Part concludes by explaining that during the same historical period, a new psychology of childhood set the stage for the emergence of new fears that children would be initiated into queerness through indoctrination, role modeling, and public approval, rather than through sexual relations with predatory adults.

### A. *Premodern Fears*

The concept of homosexuality is scarcely more than one hundred years old,[39] but the fear of the queer child is much older. In ancient Greece, more than 2000 years ago, Aristotle worried that if boys were "sexually abused from childhood," they could develop a disposition toward "sexual intercourse with males"—specifically, a disposition to play the "passive" rather than the "active" role in homosexual relations, which Aristotle analogized to the role that "women" played "in marital relations."[40] In the Middle Ages,

38. Halperin, *Deviant Teaching*, *supra* note 2, at 166.

39. DAVID M. HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY 15 (1990).

40. *See* ARISTOTLE, NICOMACHEAN ETHICS 145-46, para. 1148b, ll. 28-30 (Robert C. Bartlett & Susan D. Collins trans., 2011). One of Aristotle's students made a more explicit version of this claim in a pseudo-Aristotelian text known as *Problems*. *See* HOMOSEXUALITY IN GREECE AND ROME: A SOURCEBOOK OF ANCIENT DOCUMENTS 262-64 (Thomas Hubbard ed., 2003) (quoting 5.16 PS.-ARISTOTLE, *Problems* 4.26).

My translation of *Nicomachean Ethics* is based on my review of several leading translations, secondary sources, and correspondence with several experts on

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a French poet complained that when noble boys were sent off to boarding school, they learned the "obscene habits" of sodomy from teachers—practices in which "men make women of themselves, and stallions turn into mares."[41] In the Italian Renaissance, another poet recounted in graphic detail how he had learned the art of sodomy from his tutor, and he warned the young men of Florence about the dangers of associating with older males: "If a pederast once gets a kid in his clutches,/He knows how to drill the recruit in his art."[42] In the English Renaissance, a British

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ancient Greek language. *See, e.g.*, ARISTOTLE, *supra* note 40, at 145-46; ARISTOTLE, NICOMACHEAN ETHICS 127-28 (Roger Crisp trans., 2000); ARISTOTLE, NICOMACHEAN ETHICS 185-86 (Terence Irwin trans., 1985); ARISTOTLE, THE NICOMACHEAN ETHICS 403 (H. Rackham trans., 1934); DAVID COHEN, LAW, SEXUALITY, AND SOCIETY: THE ENFORCEMENT OF MORALS IN CLASSICAL ATHENS 180 (1991); K.J. DOVER, GREEK HOMOSEXUALITY 103 (1978); JOHN J. WINKLER, THE CONSTRAINTS OF DESIRE: THE ANTHROPOLOGY OF SEX AND GENDER IN ANCIENT GREECE (1990); *Nicomachean Ethics VII. 5-6: Beastliness, Irascibility, and Akrasia*, *in* ARISTOTLE: NICOMACHEAN ETHICS, BOOK VII SYMPOSIUM ARISTOTELICUM 103, 110 (Carlo Natali ed., 2009).

41. JAMES WILHELM, GAY AND LESBIAN POETRY: AN ANTHOLOGY FROM SAPPHO TO MICHELANGELO 168 (1995) (quoting Walter of Châtillon, *Stuli cum prudentibus currunt ad coronam*)

> When they are young, sons of the nobility
> Are sent away to France to learn scholarship;
> Corrupters of youth recruit them with coaxes and cash,
> And so they bring their obscene habits back to Artaxata.
> These are the practices of barbarians, Romans, and Greeks; . . .
> Men make women of themselves, and stallions turn into mares.

*Id.*

42. *Id.* at 291 (quoting Pacifico Massimi, *Advice to Paulinus*, *in* HECATELEGIUM (ONE HUNDRED ELEGIES), at Book I, 9)

> The only taint in my morals came from the tutor
> That my father and mother unwittingly wished upon me.
> He was the king of pederasts; no prey ever
> Escaped his hands, since he was a master of that art.
> O yes, I learned a lot of things I'd have preferred not to.
> I learned about using my mouth—and my asshole. . . .
> If a pederast once gets a young kid in his clutches,
> He knows how to drill the recruit in his art.

*Id.*

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prosecutor claimed that if a teacher had "prevailed" in his alleged attempt to have sex with one of his students, "this lad, now sixteen years old . . . would have infected all others; and as in course of years they grew big enough, they would leave the College to go into the world and spread this cursed poison."[43]

These are history's earliest examples of the fear of the queer child. By referring to these passages as "examples," however, I do not mean to imply that they are representative of the historical periods in which they were authored—or, more broadly, that the fear of a queer child was a pervasive belief in the premodern era. Because of the limitations of the premodern record, it is not possible to say whether these early analogues of the fear were commonplace, or whether they were overrepresented in the sources that have survived. I set forth these examples to show only that the fear of a queer child is a remarkably old, pliable, and enduring thought, which has proved capable of conforming itself to times and places in which people held starkly varied ideas about homosexuality and childhood.

Although these fears were articulated in disparate times and places, they touch upon several themes that anticipate the fear's evolution in the modern period.

First, these fears are sexual. They articulate a version of the seduction fear—the claim that children can be initiated into queerness by engaging in homosexual activity with adults. This was the principal version of the fear well into the modern period; in the United States, it served as one of the primary justifications for anti-LGBT policies until the 1980s.

Second, these fears are educational. They are focused on teachers and teaching, and more generally, the process through which children are socialized and initiated into

43. THOMAS A. KING, 1 THE GENDERING OF MEN, 1600–1750: THE ENGLISH PHALLUS 109 (2004) (quoting *The Trial of Richard Branson, for an Attempt to Commit Sodomy, on the Body of James Fassett, One of the Scholars Belonging to God's-Gift-College, in Dulwich. Tried at the General Quarter Session of the Peace, held at St. Margaret's Hill, in the Borough of Southwark* (1760), *reprinted in* IAN MCCORMICK, SECRET SEXUALITIES, A SOURCEBOOK OF 17TH AND 18TH CENTURY WRITINGS 113 (1997)).

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adulthood.[44] In this sense, they anticipate the contemporary fears of indoctrination, role modeling, and public approval, which claim that teachers, parents, and the state can teach children to be queer.

Third, these fears are universalizing. Although they deal with men teaching boys to engage in homosexual acts, they do not characterize the men or the boys as "homosexuals," or the acts themselves as "homosexual," because the modern concept of homosexuality had not been developed yet.[45] Rather than positing that these acts were practiced by a "small, distinct, relatively fixed" minority of homosexual persons, the authors presumed that homosexual habits could be passed on from one generation to the next.[46]

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44. Halperin, *Deviant Teaching*, *supra* note 2, at 149-50.

45. HALPERIN, *supra* note 39, at 15.

46. This is not to say, however, that the authors would not have characterized the men or the boys by reference to *any* sexual identities—just not to the identity of the "homosexual." For example, classicists agree that Aristotle was most likely claiming that if a boy were sexually abused during childhood, he was likely to become a *kinaidos*—a man who enjoyed playing the passive role in sexual relations with other males. *See, e.g.*, WINKLER, *supra* note 40, at 69; COHEN, *supra* note 40, at 180. Similarly, Walter of Chatillon may have characterized the men and the boys in his poem as "sodomites," WILHELM, *supra* note 41, at 168, and Massimi clearly refers to his former tutor as "a pederast," *id.* at 291. Several scholars have argued that the modern "homosexual" has ancestors in the *kinaidos*, the sodomite, and the pederast, just as modern homophobia has roots in the stigmas that have historically attached to various kinds of homosexual behavior. *See, e.g.*, BYRNE FONE, HOMOPHOBIA: A HISTORY 43 (2001); MAUD W. GLEASON, MAKING MEN: SOPHISTS AND SELF-PRESENTATION IN ANCIENT ROME 64 (1995); DAVID HALPERIN, HOW TO DO THE HISTORY OF HOMOSEXUALITY 32-38 (2002) [hereinafter HALPERIN, HISTORY OF HOMOSEXUALITY]; MARK D. JORDAN, RECRUITING YOUNG LOVE: HOW CHRISTIANS TALK ABOUT HOMOSEXUALITY 163-64 (2011); CRAIG WILLIAMS, ROMAN HOMOSEXUALITY: IDEOLOGIES OF MASCULINITY IN CLASSICAL ANTIQUITY 210-11 (1999); WINKLER, *supra* note 40, at 45-46. In light of these links, it seems plausible to infer modern fears about boys being seduced into the "homosexual lifestyle" are socially and culturally linked to premodern fears about boys being instilled with the habits of the *kinaidos*, the sodomite, and the pederast. As both Sedgwick and Eskridge have argued, new models of homosexual identity often coexist alongside older models. *See* SEDGWICK, *supra* note 11, at 47; Eskridge, *supra* note 5, at 1331, 1338.

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Fourth, these fears are gender-transitive. Just as Aristotle worried about boys learning to perform the woman's role in sexual relations,[47] the medieval French poet objected to "men" making "women" of themselves and "stallions" be turned into "mares."[48] Far from distinguishing between sexuality and gender, the authors presumed that an individual's performance of sexuality and gender both reflected and reinforced one another.[49]

Finally, these fears are gender-specific. All of these examples involve men and boys, and some specifically involve boys playing a passive or "effeminate" role in sexual relations.[50] Around the late nineteenth century, new fears of

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47. *See* ARISTOTLE, *supra* note 40, at 145-46. In ancient Greece, the figure of the *kinaidos* was widely reviled for this effeminate trait, much like the passive "sodomite" and the "homosexual" would be in later centuries. WINKLER, *supra* note 40, 45-54. In another text, Aristotle conflates passivity and effeminacy more explicitly in terms that are all-too familiar to modern readers: "The signs of the *kinaidos* are an unsteady eye and knock-knees; he inclines his head to the right; he gestures with his palms up and his wrists loose; and he has two styles of walking—either waggling his hips or keeping them under control." *Id.* at 67 (quoting ARISTOTLE, PHYSIOGNOMINICS, 808 12-6).

48. WILHELM, *supra* note 41, at 168.

49. *See* HALPERIN, *supra* note 39, at 15 ("Before 1892 there was no homosexuality, only sexual inversion. . . . 'Sexual inversion' referred to a broad range of deviant gender behavior, of which homosexual desire was only a logical but indistinct aspect . . . .") (quoting George Chauncey, Jr., *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance*, 58 SALMAGUNDI 114, 116 (1982)). *See generally* Valdes, *supra* note 28 (arguing that the conflation of sex, gender, and sexual orientation was a pervasive feature of premodern thought in Europe and the United States).

50. *See* Halperin, *Deviant Teaching*, *supra* note 2, at 151, 154-55 (arguing that fears about teaching, pederasty, and sodomy are specifically focused on "the male education of boys" and "the successful reproduction and transmission of masculinity across the generations").

My review of the historical literature on female homosexuality did not reveal any premodern examples of the fear of the queer child involving women and girls. *See, e.g.*, LEILA J. RUPP, SAPPHISTRIES: A GLOBAL HISTORY OF LOVE BETWEEN WOMEN (2009); ELIZABETH SUSAN WAHL, INVISIBLE RELATIONS: REPRESENTATIONS OF FEMALE INTIMACY IN THE AGE OF ENLIGHTENMENT (1999); BERNADETTE J. BROOTEN, LOVE BETWEEN WOMEN: EARLY CHRISTIAN RESPONSES TO FEMALE HOMOEROTICISM (1998); LILLIAN FADERMAN, SURPASSING THE LOVE OF MEN: ROMANTIC FRIENDSHIP AND LOVE BETWEEN WOMEN FROM THE RENAISSANCE TO THE PRESENT (1981). This impression is confirmed by historians of this period. *See, e.g.*, HALPERIN, HISTORY OF HOMOSEXUALITY, *supra* note 46, at 76

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women seducing girls began to appear alongside much older fears about men and boys.[51] But even during the twentieth century, the fear of seduction was brought to bear most frequently and forcefully upon men and boys.[52]

Looking back on these premodern examples, it may be tempting to interpret them as objections to pederasty—that is, to the practice of adults having sex with children—rather than fears about the transmission of queerness among males. But even putting aside the practice of *paederastia* in ancient Greece,[53] it would be anachronistic to view the early

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("Certainly, being seduced by a tribade does not make you a tribade yourself."); BROOTEN, *supra* note 50, at 361 (1998) ("In contrast to their presentations of male homoeroticism, the sources practically never accuse homoerotic women of sex with children . . . .").

The absence of fears about women seducing girls into queerness is likely explained by the convergence of the following gender norms, among others: (1) The norm that males are more sexually aggressive than females; (2) the norm that defines sexual activity as penetration by the phallus; and (3) the norm that heterosexual males often pursue younger females, which effectively pushes the back the cultural boundary between women and girls. Each of these norms were likely more prevalent in the premodern period, and they would explain why the fear of seduction was not often articulated in ways that included the possibility of women seducing girls.

51. *See, e.g.*, HAVELOCK ELLIS, SEXUAL INVERSION 129 (F. A. Davis Co. 1901) (1897) (claiming that one of the most important exciting causes of sexual inversion was "seduction," which he defined as "the initiation of a young *boy or girl* by some older and more experienced *person* in whom inversion is already developed, and who is seeking the gratification of the abnormal instinct") (emphasis added); RUPERT CROFT-COOKE, BOSIE: THE STORY OF LORD ALFRED DOUGLAS, HIS FRIENDS AND ENEMIES 132 (1963) (quoting letter from June 28, 1895 in which Douglas wrote: "Perhaps you are not aware that 'Lesbianism' exists to any extent in London, but I can assure you that it does, and though I of course cannot mention names, I could point out to you half a dozen *women* in society or among actresses who would be considered as 'dangerous' to young *girls* as Oscar Wilde will I suppose henceforth be considered to *boys*."); *see also* LISA DUGGAN, SAPPHIC SLASHERS: SEX, VIOLENCE, AND AMERICAN MODERNITY 174 (2000) (quoting James Kiernan, *Responsibility in Sexual Perversion*, 20 UROLOGIC & CUTANEOUS REV. 44, 47 (Jan. 1916) (arguing that women who were "deeply ingrained sex inverts . . . see no harm in [the] seduction of young *girls*.") (emphasis added)).

52. *See* PHILLIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 62 (1998).

53. Classical scholars agree that male pederasty was both permitted and practiced in ancient Greece. ANDREW LEAR & EVA CANTARELLA, IMAGES OF ANCIENT GREEK PEDERASTY: BOYS WERE THEIR GODS, at xv (2008). In this

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sources only as protests against intergenerational sex. As Philippe Ariès famously observed in *Centuries of Childhood*, premodern societies did not conceptualize childhood as a distinct period of sexual innocence or weakness.[54] Among other things, Ariès notes that "[t]he practice of playing with children's privy parts formed part of a widespread tradition" in medieval societies, along with the even more widespread tradition of exposing children to "the sexual ribaldries of adults."[55] Looking back at the texts of this period, he explains: "The modern reader . . . is astonished by the liberties which people took with children, by the coarseness

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custom, adult male citizens engaged in courtship rituals and sexual relations with teenage boys, as a method of educating and mentoring them into citizenship and adulthood. Once the younger male reached adulthood—an occasion marked by the growth of a beard—the relationship ended. After a few years of adulthood, the young man was permitted to take on a lover himself. *Id*. at 2-6.

In other words, the tradition of ancient Greek pederasty involved men training boys in the art of homosexual relations (among other things), and it clearly contemplated boys carrying this custom into adulthood. Yet given that ancient Greeks often praised this tradition in effusive terms, it would be wildly anachronistic to interpret the tradition itself as an example of the *fear* of children's queerness. In Plato's *Symposium*, for example, Phaedrus muses, "I know not any greater blessing to a young man who is beginning life than a virtuous lover, or to a lover than a beloved youth," and Aristophanes extols boys who "hang about men and embrace them" as "the best of boys and youths because they have the most manly nature." Even Pausanias, who was more wary of such relationships, conceded that "he who gives himself to a lover because he is a good man, and in the hope that he will be improved by his company, shows himself to be virtuous," because "this is that love which is the love of the heavenly goddess, and is heavenly, and of great price to individuals and cities." *See* PLATO, SYMPOSIUM 20 [178b-179b], 26 [184c-185c], 32 [191a-192a] (Benjamin Jowett trans., 1956). In more ways than one, such praise is a far cry from Anita Bryant's campaign against "homosexual recruitment," in which she analogized homosexuals to "prostitutes, thieves, or murderers." Morton Kondracke, *Anita Bryant Is Mad About Gays*, THE NEW REPUBLIC, May 7, 1977, at 14.

54. PHILLPE ARIÈS, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 100-06 (Robert Baldick trans., 1962). Indeed, Ariès went so far as to claim that the medieval period lacked any "awareness of the particular nature of childhood . . . which distinguishes the child from the adult, even the young adult," and thus, that "[i]n medieval society the idea of childhood did not exist." *Id*. at 128. While this broader claim has been subject to criticism, my historical analysis does not depend upon it.

55. *Id*. at 103.

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of the jokes they made, and by the indecency of gestures made in public."[56]

Rather than objecting to seduction as a violation of children's innocence or weakness, these premodern authors were more likely to conceptualize the fear of homosexual seduction as a special case of a general phenomenon—the spread of sodomy—which was understood to afflict individuals of all ages. During the medieval period, for example, the sin of sodomy was commonly portrayed through metaphors of "plague, infestation, and disease,"[57]—as a form of contagion that could easily "spread from one person to another."[58]

### B. *The Modern Rise*

In a provocative essay titled *Deviant Teaching*, David Halperin claims that the modern fear of the homosexual child molester arises out of society's long-standing anxieties about the role of men—in particular, male teachers—

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56. *Id*. at 100.

57. FONE, *supra* note 46, at 187; JORDAN, *supra* note 46, at 7, 82, 111, 122, 134, 165.

58. JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 316 n.52 (1980) (quoting ALBERTUS MAGNUS, IN EVANGELIUM LUCAE). During the same historical period, sodomy came to be known as an "unspeakable" vice during this period, a sin that should not be named. JORDAN, *supra* note 46, at 92-93, 106, 111, 133, 150-51. As Mark Jordan has explained, the purpose of this silence was to prevent priests from suggesting "sins that the penitent might not otherwise have imagined." *Id*. at 93.

This tradition of refusing to name sodomy survived well into the modern era. In William Blackstone's *Commentaries*, the jurist defined sodomy as "*peccatum illud horribile, inter christianos non nominandum*"—the horrible crime not fit to be named among Christians. 2 WILLIAM BLACKSTONE, COMMENTARIES *345. In the United States, most states continued to define sodomy in vague terms until the 1940s and 1950s—most commonly as "the crime against nature."

Although the *non nominandum* rule was not specifically designed to protect *children* from queerness, it was broadly intended to prevent people from learning queerness from one another. In this sense, it is one of the earliest antecedents for the contemporary fears that children will be initiated into queerness through the non-sexual mechanisms of indoctrination, role modeling, and public approval.

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initiating boys into manhood.[59] He speculates that these anxieties began to focus specifically on the possibility of men having sex with boys around the turn of the century—alongside the invention of the modern concepts of the "homosexual" and the "heterosexual."[60]

Halperin's claim seems incontrovertible, as far as it goes: by definition, society couldn't imagine the homosexual child molester unless and until it developed the concept of the "homosexual." But as this Section explains, Halperin's account can be bolstered by the addition of another telling detail—the convergence of the histories of homosexuality and childhood in the modern era. Although this coincidence has hardly been explored by historians,[61] the birth of modern "homosexual" seems to coincide roughly with the birth of the modern "child," at least insofar as the concepts were institutionalized and popularized in the United States. Around the turn of the century, just as the concept of homosexuality emerged as a new identity, the concept of childhood emerged as a new stage of development: the sodomite was reimagined as the homosexual, and the child was reimagined as a becoming, rather than a being—a not-yet formed individual, who no longer belonged among the

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59. Halperin, *Deviant Teaching*, *supra* note 2, at 154 ("The initiation of boys into manhood by men is a traditional source of anxiety. . . . It is in this context that the possibility of corruption whether moral or sexual—the possibility of 'sodomy,' in other words—comes to represent a perennial threat . . . .").

60. *Id.* at 155 ("I'll go on to speculate that such anxieties about deviant teaching come to single out the issue of sex and to focus obsessively on it in particular when the initiation of boys into manhood takes place within a specifically heterosexual and heteronormative society.").

61. *But cf.* WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS 40 (2008) [hereinafter ESKRIDGE, DISHONORABLE PASSIONS] ("At the same time that Americans were growing obsessively concerned about protecting children from sexual abuse, they constructed the image of the (male) homosexual as a predator victimizing their sons and daughters."); THOMAS L. LAQUEUR, SOLITARY SEX: A CULTURAL HISTORY OF MASTURBATION 254-67 (2003) (analyzing the hypotheses that "the rise of concern about masturbation was an aspect of the rise of concern about homosexuality," and that "masturbation became a problem because new boundaries for heterosexuality had to be secured"); MICHAEL FOUCAULT, 1 HISTORY OF SEXUALITY 43 (1978) ("The nineteenth-century homosexual became a personage, a past, a case history, and a childhood . . . .").

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world of adults.[62] Above all, childhood was conceptualized as a period of *sexual* becoming—not only a time of vulnerability, impressionability, and innocence, but a time that presented the risks of hypersexuality, pansexuality, and the development of other vices that were commonly associated with sexual excess.[63]

By the late 1800s, a new vision of childhood had begun to take root in the United States. Until this period, the age of consent for sexual intercourse had been only ten years in most jurisdictions,[64] and there had not been any laws specifically targeting sexual offenses against minors.[65] By 1895, most jurisdictions had increased the age of consent to between fourteen and eighteen years,[66] and states began

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62. *Compare* STOCKTON, *supra* note 17, at 37 (noting that "[m]easures aimed at safeguarding children were one of the earmarks" of the early twentieth-century United States, *with* Eskridge, *supra* note 61, at 40 (noting the medical concept of the "homosexual" entered popular discourse in the early twentieth-century United States). In *Solitary Sex*, historian Thomas Laqueur resists the hypotheses that "the rise of concern about masturbation was an aspect of the rise of concern about homosexuality" and that "masturbation became a problem because new boundaries for heterosexuality had to be secured." LAQUEUR, *supra* note 61, at 267. In response to such claims, he observes that "the solitary vice was associated . . . not only with sodomy but with every other sort of sexual and moral deviance as well." *Id*. He acknowledges, however, that "[t]his does not mean that the histories of homosexuality and nonanism are not linked," insofar as they both "became newly exigent as the old constraints on sexuality crumbled." *Id*.

63. Writing of "the history of juvenile courts," Stockton makes a parallel observation about the emergence of the modern concept of childhood in the United States:

> [E]vidently, we are scared of the child we would protect. . . . Just as children are deemed more vulnerable by their guardians in the 1900s (and thus are deemed more in need of protections, many in the form of laws), they are constructed as more problematic, as presenting adults with more and newer problems, even dangers to face. . . . This is a story about . . . the creation a new kind of child: a 'delinquent,' a *pre*-criminal person, who must be protected from his own propensities and from the environment that could set them off.

STOCKTON, *supra* note 17, at 16, 37.

64. JENKINS, *supra* note 52, at 24.

65. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 61, at 3-4; JENKINS, *supra* note 52, at 23.

66. JENKINS, *supra* note 52, at 24.

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passing laws to protect children from the newly recognized offense of taking "immoral, improper, or indecent liberties"[67] with a minor.

In 1883, the new sensibility of this era was aptly conveyed by the Reverend J.M. Buckley, the vice president of Anthony Comstock's New York Society for the Prevention of Vice. In his introduction to Comstock's manifesto *Traps for the Young*, Buckley warned that society must not only protect children from predatory adults, but protect itself from the possibility that children will grow up to be predators: "Every new generation of youth is sent out into the world as sheep in the midst of wolves. The danger, however, is not that they will be devoured by them, but that they will be transformed into wolves."[68]

During this period, the histories of homosexuality and childhood overlapped in remarkable ways. In 1892, the term "homosexuality" was introduced into the English language by Dr. Charles Chaddock;[69] only two years later, the same physician introduced Americans to the newly recognized problem of child sexual abuse.[70] In his 1894 essay *Sexual Crimes*, Chaddock made the astounding claim that the "rape of children is the most common form of sexual crime," accounting for an estimated 80% of all reported rapes.[71] In addition, he used the term "pederasty" to refer to the act of

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67. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 61, at 54-55.

68. *Id.* at 29 (citing J.M. Buckley, *Introduction* to ANTHONY COMSTOCK, TRAPS FOR THE YOUNG, at vi (1883)). Buckley may well have been thinking of boys growing up to be pederasts. As historian George Chauncey observes, the term "wolf" was often used as a slang for "active pederast" in New York City during this historical period. *See* GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940, at 88 (1994). In any event, Buckley was surely not thinking of "homosexuals" in the modern sense of that word. The term "homosexuality" did not enter the English language until 1892, and it did not enter popular usage until decades later. *See* HALPERIN, *supra* note 39, at 15.

69. HALPERIN, *supra* note 39, at 15.

70. *See* JENKINS, *supra* note 52, at 28 (quoting Charles G. Chaddock, *Sexual Crimes*, *in* 2 A SYSTEM OF LEGAL MEDICINE 547 (Allan McLane Hamilton & Lawrence Godkin eds., 1894)).

71. *Id.*

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intercourse involving two males of any age,[72] reflecting the long-standing tendency to conflate the concepts of homosexuality and sodomy with man-boy relations.[73]

As the concept of "sexual inversion" began to take shape in early sexology texts,[74] the fear of seduction played a prominent role in the discipline's hunt for homosexuality's origins. In 1901, sexologist Havelock Ellis published *Sexual Inversion*,[75] the first United States edition of a popular medical textbook devoted to the subject.[76] Although Ellis argued that sexual inversion was "based on congenital conditions,"[77] he conceded that it was only "a predisposition . . . to experience sexual attraction to the same sex"—a tendency that could "remain latent and unroused" unless it were "triggered" by an "exciting cause."[78]

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72. *Id*.

73. *See, e.g.*, UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (1675) (defining "pederasty" as "Buggery" and "pederast" as "Sodomite"). *See generally* OXFORD ENGLISH DICTIONARY 372 (1st ed. 1961) (1933) (defining "pederasty" as "[u]nnatural relations with a boy; sodomy" and "pederast" as "sodomite," based on pattern of usage in seventeenth, eighteenth, and nineteenth centuries). One of history's most famous examples of this conflation is Jeremy Bentham's essay *On Paederasty*, which offered a defense of consensual sexual relations among adult males. Although Bentham originally authored this essay in 1785, it was not published until 1978. *See* Louis Crompton, 3 J. HOMOSEXUALITY 389 (1978); Louis Crompton, 4 J. HOMOSEXUALITY 91 (1978).

74. Early sexologists constructed "homosexuality" as one symptom of a broader disorder known as "sexual inversion," which included a broad range of gender variant behavior that was diagnosed in both males and females. Chauncey, *supra* note 49, at 116. Under this paradigm, male "inverts" were often described as "a feminine brain in a male body," and vice-versa. *See, e.g.*, RICHARD VON KRAFFT-EBBING, PSYCHOPATHIA SEXUALIS: A MEDICO-FORENSIC STUDY 226 (Franklin S. Klaf trans., 1965) (1898). Cross-dressing was considered to be characteristic of sexual inverts, and case histories often emphasized the significance of gender-variant behavior in childhood. In 1883, for example, one physician observed that his patient "was peculiar in girlhood, in that she preferred masculine sports and labor; had an aversion to attentions from young men and sought the society of her own sex." Chauncey, *supra* note 49, at 119-20.

75. ELLIS, *supra* note 51.

76. DUGGAN, *supra* note 51, at 27.

77. *See* ELLIS, *supra* note 51, at 181; *see also* KRAFFT-EBBING, *supra* note 74, at 285.

78. ELLIS, *supra* note 51, at 190.

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Echoing a theme that was already centuries old, Ellis claimed that an early incident of "seduction" during childhood was among the most "important exciting causes" of sexual inversion.[79] Rendering this ancient fear in distinctly modern terms, he explained:

> By this I mean the initiation of a young boy or girl by some older and more experienced person in whom inversion is already developed, and who is seeking the gratification of the abnormal instinct. This appears to be a not uncommon incident in the early history of sexual inverts.[80]

Recalling long-standing anxieties about teachers and schools, Ellis claimed that "a large number" of sexual inverts "date the development of homosexuality from the influences and examples of school life."[81]

By the late 1930s, the new concepts of homosexuality and childhood had been widely popularized and institutionalized in the United States, and the image of the homosexual child molester emerged as one of society's most sinister figures.[82] In 1939, two British criminologists articulated one of the first thoroughly modern examples of the fear—the claim that exposing children to "homosexuals" would make them more likely to become "homosexual."[83]

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79. *See supra* note 40 and accompanying text.

80. ELLIS, *supra* note 51, at 190. Because Ellis is operating within the new framework of sexual inversion, which applies to both males and females, he depicts the scene of seduction in gender-neutral terms: A young "boy or girl" is seduced by an older and more experienced "person" in whom inversion is already developed. *Id.* To the best of my knowledge, this passage is the earliest example in which the fear of the queer child was articulated in gender-neutral terms. *See supra* note 40 and accompanying text.

81. *Id*. In a similar vein, Ellis observed that many inverts traced the emergence of homosexuality back to "the segregation of boys and girls apart from each other during the important periods of puberty and adolescence." *Id*.

82. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 37-43 (2000) [hereinafter ESKRIDGE, GAYLAW]; ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 61, at 40; Estelle B. Freedman, *"Uncontrolled Desires": The Response to the Sexual Psychopath, 1920–1960*, 74 J. AMER. HIST. 83, 89, 100, 102 (1987).

83. W. NORWOOD EAST & W.H. DE B. HUBERT, REPORT ON THE PSYCHOLOGICAL TREATMENT OF CRIME (1939), *reprinted in* SEXOLOGY UNCENSORED, THE DOCUMENTS OF SEXUAL SCIENCE 70 (Lucy Bland & Laura L. Doan eds., 1998).

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Reporting on a survey of more than 4000 adolescents, the authors wrote: "Seduction in early youth or childhood was the commonest single environmental factor found in the series investigated."[84] Taking aim at the congenital theories of early sexologists, they continued: "This sequence of events appeared most important in the causation of homosexuality, and is probably far more likely an explanation than one which depends upon the assumption that there is commonly some specific glandular influence acting in a feminine direction in these cases."[85] Emphasizing the predatory nature of male homosexuals, they warned that "[a]ttractive and good-looking boys and young men would be predisposed to the development of homosexuality because they would be more likely to be the focus of attention of homosexuals."[86] Several years later, after a wave of children's murders, these findings were republished in a leading American psychiatry journal and invoked to justify the adoption of new laws targeting sexual psychopaths.[87]

In the 1950s, the fear of seduction was invoked by federal, state, and local governments to justify a campaign to purge homosexuals from civil service and public schools.[88] In legislative reports, politicians often claimed that homosexuals sought to seduce children into homosexual encounters.[89] In 1950, for example, Senator Clyde Hoey's Committee Report recommended that "homosexuals and other sex perverts" be banned from federal employment on the grounds that "perverts will frequently attempt to entice normal individuals to engage in perverted practices,"

84. *Id*.

85. *Id*.

86. *Id*.

87. Freedman, *supra* note 82, at 104 (citing Norwood W. East, *Sexual Offenders*, 103 J. NERVOUS & MENTAL DISEASES 648-49 (1946)). As historians Estelle Freedman and George Chauncey have noted, the image of the homosexual child molester emerged in response to two waves of children's murders in the late 1930s and 1940s. *Id*. at 103-105; CHAUNCEY, *supra* note 68, at 359-60.

88. *See* ESKRIDGE, GAYLAW, *supra* note 82, at 100-104.

89. *Id.*

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emphasizing that "[t]his is particularly true of young and impressionable people that might come under the influence of a sex pervert."[90]

The most elaborate example of this new legal argument was articulated by the Johns Committee of the Florida State Legislature, which launched a campaign to rid the state's public schools of homosexual teachers in 1958. At the end of a six-year investigation, the committee described the threat of homosexuality in terms that would be closely echoed by Anita Bryant's Save Our Children campaign, fifteen years later: "[A] great many homosexuals have an insatiable appetite for sexual activities and find special gratification in the recruitment to their ranks of youth."[91] In a remarkable move, the Johns Committee even claimed that the creation of new homosexuals was the *motive* of homosexual predators: "The homosexual prefers to reach out for the child at the time of normal sexual awakening and to conduct a psychological preliminary to the physical contact. The homosexual's goal and part of the satisfaction is to 'bring over' the young person, to hook him for homosexuality."[92] With melodramatic flair, the Committee claimed that the strategy of seduction effectively allowed homosexuals to reproduce as a species, by breeding a new generation of homosexual predators: "[H]omosexuality is unique among the sexual assaults considered by our laws in that the person affected by the practicing homosexual is first a victim, then an accomplice, and finally himself a perpetrator of homosexual acts."[93]

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90. DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT 101-18 (2004) (quoting Subcomm. on Investigations of the Senate Comm. on Expenditures in the Exec. Dep'ts, *Interim Report: Employment of Homosexuals and Other Sex Perverts in Government* (1950)).

91. ESKRIDGE, GAYLAW, *supra* note 82, at 84 (quoting Florida Legislative Investigation Comm., Homosexuality and Citizenship in Florida (Tallahassee, Jan. 1964) in Johns Papers, Box 1, Folder 21).

92. *Id*.

93. *Id*.

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C. *Seduction's Successors*

In addition to stoking the fear of seduction, early psychologists introduced more nuanced theories about homosexuality's origins that set the stage for the emergence of subtler versions of the fear in coming years. In the early twentieth century, the revolutionary work of Sigmund Freud served as a catalyst for reconceptualizing children's sexual and gender development. Freud's introduction of the theory of the unconscious, which posited the pervasive influence of sexual thoughts in the individual's construction of self,[94] opened the door for a century of both professional and amateur speculations about hidden fantasies, fetishes, and perversions within children's psyches. But Freud's most significant contributions to the evolution of the fear were ones that he could hardly have anticipated, because they were popularized by successors who attacked the basic premises of his work.

In his famous *Three Essays*, Freud introduced his Oedipal model of child sexual development, which represented a radical departure from the congenital theories of homosexuality offered by early sexologists.[95] One of the foundational assumptions of Freud's model was that "in every normal male or female individual, traces are found of the opposite sex"[96]—a claim that he later described as "the universal bisexuality of human beings."[97] Although Freud's views on homosexuality were notoriously ambivalent, he clearly believed that a child's sexual orientation was determined by nurture, rather than nature—in particular, by the child's relationship with his parents. In a famous letter to one patient's mother, he wrote

94. SIGMUND FREUD, THREE ESSAYS ON THE THEORY OF SEXUALITY (1905), *reprinted in* 7 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 133-34 (James Strachey trans. & ed., The Hogarth Press Ltd. 1953).

95. *Id.* at 141.

96. *Id.*

97. SIGMUND FREUD, THE PSYCHOGENESIS OF A CASE OF HOMOSEXUALITY IN A WOMAN (1920), *reprinted in* 18 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 157 (James Strachey trans. & ed., The Hogarth Press Ltd. 1955) [hereinafter FREUD, THE PSYCHOGENESIS].

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that homosexuality was "produced by a certain arrest of sexual development," but he insisted that "it is nothing to be ashamed of, no vice, no degradation," and "it cannot be classified as an illness."[98] As for the prospect of "curing" homosexuals, he was skeptical: "In general, to undertake to convert a fully developed homosexual into a heterosexual does not offer much more prospect of success than the reverse."[99]

By the late 1930s, Freud's work had already transformed the theory and practice of psychology in the United States. Yet shortly after Freud's death in 1939, a group of American psychoanalysts successfully challenged his views on the etiology of homosexuality and the treatment of homosexuals.[100] Sandor Rado argued that heterosexuality, rather than bisexuality, was an innate characteristic of all human beings and that homosexuality was an unnatural condition triggered by poor parenting.[101] Picking up on this theme, Irving Bieber and Charles Socarides developed the popular model that male homosexuality developed when boys were raised by mothers who were "close-binding," "domineering, harsh, and phallic" and fathers who were "detached," "absent," and "weak."[102] This family dynamic, they believed, caused a boy to identify with his mother instead of his father and develop feminine rather than masculine traits—including a sexual attraction to other males.[103]

During the postwar period, the new model of homosexuality introduced by Rado, Bieber, and Socarides was widely embraced by mainstream psychologists. In 1952,

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98. Letter from Sigmund Freud to Anonymous Mother (Apr. 9, 1935), *reprinted in A Letter from Freud*, 107 AM. J. PSYCHIATRY 786, 786-87 (1951).

99. FREUD, THE PSYCHOGENESIS, *supra* note 97, at 145.

100. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 37 (2006).

101. SANDOR RADO, ADAPTATIONAL PSYCHODYNAMICS: MOTIVATION AND CONTROL 212 (1969).

102. CHARLES W. SOCARIDES, HOMOSEXUALITY 183-84 (1978); IRVING BIEBER ET AL., HOMOSEXUALITY 79-81 (1975).

103. *Id.*

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the American Psychiatric Association categorized homosexuality as a "sociopathic personality disorder" in the first edition of the *Diagnostic and Statistical Manual of Mental Disorders*, the organization's definitive index of psychiatric diseases.[104] Armed with this diagnosis, postwar therapists often sought to "convert" male patients to heterosexuality by instilling them with masculinity, in an attempt to "cure" them of maternal influences and effeminate characteristics.[105] Much like the model of sexual inversion propounded by early sexologists, conversion therapists held that inadequate gender socialization—specifically, too much mothering and not enough fathering—often caused boys to develop homosexual desires, engage in homosexual acts, and identify as gay or bisexual.[106] This model set the stage for the 1970s and 1980s, when fears of indoctrination and role modeling began to displace fears of seduction as the rallying cry for opponents of LGBT rights.

## III. CONTEMPORARY REINCARNATIONS

This Part links the old with the new. By tracing the emergence of the fear's contemporary reincarnations, it explains how opponents have nearly managed to dictate the normative parameters of legal and political debates about LGBT rights for the last fifty years. Building upon William Eskridge's influential *No Promo Homo* model of anti-gay discourse, it examines the fears of indoctrination, role

104. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38-39 (1952).

105. YOSHINO, *supra* note 100, at 38-39.

106. Although some psychologists proposed similar theories about female homosexual development in this era, none gained widespread acceptance among mainstream psychologists. *See, e.g.*, SOCARIDES, *supra* note 102, at 188 (claiming that lesbianism derives from a girl's "dread of . . . a malevolent mother" and her conviction that her father "rejects and hates her"); *see also* EDA G. GOLDSTEIN & LOIS C. HOROWITZ, LESBIAN IDENTITY AND CONTEMPORARY PSYCHOTHERAPY: A FRAMEWORK FOR CLINICAL PRACTICE 17-19 (2003) (noting that several early psychoanalysts dissented from Freudian theories of lesbianism and female sexual development); *id*. at 23 (noting that lesbianism and female sexual development were not systematically explored by psychotherapists until the 1970s).

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modeling, and public approval in judicial opinions and legislative debates since the 1970s. After considering how each of these fears has influenced legal conflicts over LGBT rights, this Part concludes by observing a significant new trend in the fear's development—the resurgence of fears about children's gender-variance during the 1990s and 2000s. In response to the public's changing attitudes about lesbian, gay, and bisexual people, opponents of LGBT rights have pivoted toward the "man in a dress" as the new target for an old set of fears.

### A. *Disaggregating No Promo Homo*

Social movements often beget backlashes.[107] When one group challenges a discriminatory regime, another group tries to preserve it. In her work on the feminist and civil rights movements, Reva Siegel has shown that "[c]ivil rights agitation plays a significant role in precipitating the modernization of status regimes."[108] When a new movement successfully contests one of the regime's justifications, the regime's defenders develop alternatives. Over time, Siegel explains, the regime's justifications are "translated from an older, socially contested idiom into a newer, more socially acceptable idiom."[109] Instead of simply abolishing a status regime, civil rights reform "modernizes the rules and rhetoric through which status relations are enforced and justified."[110] Siegel dubs this dynamic "preservation through transformation,"[111] or the "modernization" of justifications for discriminatory regimes.[112]

In his article *No Promo Homo*, William Eskridge draws upon Siegel's framework to develop a dynamic model of the

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107. *See generally* LINDA HAMILTON KRIEGER, BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (2003); Jessica Roberts, *To Have and To Uphold: The Common Language of Status-Preserving Countermovements*, 21 NAT'L BLACK L.J. 122, 122 (2009).

108. Siegel, *supra* note 7, at 2179.

109. *Id*.

110. *Id*.

111. *Id*. at 2178.

112. *Id*. at 2184.

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evolution of anti-LGBT rhetoric.[113] Following Siegel, he argues that anti-LGBT discourse was "modernized" in the 1970s, in response to the early progress of the LGBT movement. Before Stonewall, Eskridge observes, "laws or social norms stigmatizing gay people were justified on the ground that gay people do disgusting things or are diseased or predatory,"[114] but "[s]ince the 1960s, these justifications have been supplemented with arguments that progay changes in law or norms would encourage homosexuality or homosexual conduct."[115] Dubbing the new paradigm "No Promo Homo,"[116] Eskridge explains that the first principle of "The Standard Argument" is that "[i]f the state adopts policy x ([or] abandons policy y) it would be endorsing and promoting homosexuality or homosexual behavior."[117] He explains that "[t]his kind of argument became salient once gay, lesbian, bisexual, and transgendered people started making some headway in reducing state antigay policies."[118] Eskridge is careful to note that as opponents introduce new arguments against the recognition of LGBT rights, a process of "sedimentation" occurs which "allows modern tropes to mingle with ancient ones."[119] "[T]he old arguments do not disappear," he explains, but "remain as foundational layers over which new arguments intellectually sediment."[120]

The important work of Siegel and Eskridge provides a vital foundation for understanding how opponents of LGBT rights have transformed the fear of the queer child in the years since Stonewall. In Siegel's terms, opponents

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113. Eskridge, *supra* note 5, at 1346.

114. *Id*. at 1328-29.

115. *Id*. at 1329.

116. *See* Nan D. Hunter, *Identity, Speech and Equality*, 79 VA. L. REV. 1695, 1702 (1993) (using the phrase "No Promo Homo" to describe the Briggs Initiative's new strategy of banning the "'advocating' and 'promoting' of homosexuality").

117. *Id*.

118. *Id*.

119. *Id.* at 1338.

120. *Id*. at 1331.

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"modernized" the fear during the 1970s, in response to the LGBT movement's progress. During this period, the age-old fear of seduction was translated into less stigmatizing, more acceptable terms. When compared to the old fears, Eskridge explains, the new fears were "more abstract and less personal."[121] On the one hand, they posed "less risk of riling and thereby mobilizing [LGBT] people"[122]; on the other hand, they allowed opponents "to attract the support of the tolerant but anxious middle ground of the American public."[123]

Building upon this framework, this Part makes two contributions to the understanding of anti-LGBT rhetoric in the post-Stonewall period. First, it demonstrates that above all, No Promo Homo campaigns were specifically targeted at children and childhood—the period of development in which individuals are thought to be most vulnerable to the influences of indoctrination, role modeling, and public approval. By focusing on the impact of policies on children's sexual and gender development, opponents sought to bracket the legal and moral status of LGBT adults, while making more plausible empirical claims about the transmission of queerness. Second, this Part shows that by introducing a set of alternative theories of how children are initiated into queerness by teachers, parents, and the state, opponents of LGBT rights effectively multiplied the empirical foundations for the fear of the queer child. Rather than relying exclusively on claims of seduction, opponents invoked new themes of indoctrination, role modeling, and public approval to establish an over-determined, mutually-reinforcing network of alternative justifications for anti-LGBT policies. These two dimensions of the fear's transformation are especially significant, because they explain much of the fear's plausibility, prevalence, and staying power in the contemporary period. When opposition to LGBT rights is focused on children and justified on a

121. *Id*. at 1365.

122. *Id*.

123. *Id*.; *see also* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 414, 460-62, 475-76 (1999) (arguing that rhetoric about deterrence helps advocates avoid expressing views that are morally and culturally contested).

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handful of shifting, alternative grounds, it becomes more appealing to a wide audience and more challenging for LGBT advocates to rebut.

### B. *The Backlash Begins*

The modern LGBT movement is typically dated to the Stonewall riots of June 29, 1969, when gay and transgender bar patrons responded to a police raid by resisting arrest, sparking a series of public protests.[124] In the wake of these demonstrations, the gay liberation movement rapidly organized and mobilized; within the next decade, the cause began to make remarkable gains. In 1972, East Lansing, Michigan passed the country's first law prohibiting discrimination based on "affectional or sexual preference."[125] In 1973, the American Psychiatric Association removed the diagnosis of "homosexuality" from the DSM, indicating that psychologists should no longer treat homosexuality as a mental disorder.[126] In 1975, the U.S. Civil Service Commission adopted a policy prohibiting discrimination based on sexual preference.[127] By 1977, sodomy laws had been repealed in nineteen states and anti-discrimination ordinances had been adopted in more than forty municipalities across the United States.[128]

Rather than repeating the tired tropes of the 1950s, opponents of LGBT rights began to introduce a series of refinements to the fear of the queer child. Before Stonewall, they had emphasized the specter of seduction—adults initiating children into queerness through sexual activity between adult and child. After Stonewall, opponents began to articulate fears about adults influencing children's sexual

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124. Hunter, *supra* note 116, at 1702; *see generally* MARTIN DUBERMAN, STONEWALL (1993) (telling the story of the events surrounding the Stonewall riots).

125. GREAT EVENTS FROM HISTORY: GAY, LESBIAN, BISEXUAL, AND TRANSGENDER EVENTS, 1848–2006, at 228 (Lillian Faderman et al. eds., 2007).

126. DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 199-217 (1999).

127. *Id*. at 532.

128. ESKRIDGE, GAYLAW, *supra* note 82, at 328-37, 356-61.

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and gender development through the subtler dynamics of indoctrination, role modeling, and public approval.

These new justifications for anti-LGBT policies began to surface in judicial opinions and legislative debates during the early 1970s.[129] In the late 1970s, the new paradigm was popularized by Anita Bryant's "Save Our Children" campaign, which became an enduring template for opposition to LGBT rights. By the mid-1980s, the old fear of seduction had been substantially (though never completely) displaced by the new fears of indoctrination, role modeling, and public approval, which then became the primary justifications for anti-LGBT policies in the post-Stonewall era. The new fears were most often invoked in debates over parenting and education policies, but they surfaced in debates over a broad range of anti-LGBT policies.

More than anything else, the differences among the fears of seduction, indoctrination, role modeling, and public approval turn on subtle variations in the ways that opponents have imagined the process of children becoming queer—variations that attribute principal agency to adults, children, and the state itself. Like the seduction fear, the indoctrination fear imagines LGBT parents and teachers playing the lead role by actively recruiting children into queerness. By comparison, the rhetoric of role modeling downplays the agency of adults; it imagines children playing a more active role in the spread of queerness by "learning" from, "identifying" with, and "imitating" LGBT parents and teachers. Ironically, although the rhetoric of role modeling seems less stigmatizing than accusations of indoctrination and recruitment, it allows opponents to criticize a much broader spectrum of LGBT life, including many of life's most private and banal moments—a parent living with a same-sex partner, displaying same-sex affections, wearing a commitment ring, or coming out to a child.

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129. *See, e.g.*, Acanfora v. Bd. of Ed. of Montgomery Cnty., 359 F. Supp. 843 (D. Md. 1973) (holding that a teacher is protected from being fired after his school finds out he is homosexual, but that same teacher is not protected if they make public appearances that rouse controversy).

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The discourse of public approval takes this logic one step further by removing LGBT adults from the process through which queerness is transmitted. In this rhetoric, it is primarily the government that indoctrinates children into queerness, rather than any particular LGBT parent or teacher. In effect, the state serves as the child's "role model," sending the message to children that queerness and straightness are equivalent to straightness. In the legislative hearings on the Defense of Marriage Act, one rabbi aptly summarized his belief in the state's ability to socialize children into heterosexual or homosexual relationships: "As many parents and teachers instinctively recognize . . . the laws by which a society chooses to govern itself have (among other things) an educational function."[130]

### C. *Indoctrination*

Even as early as the 1950s and 1960s, terms like "indoctrination," "recruitment," and "proselytizing" had been used as euphemisms for soliciting and seducing minors.[131] In the early 1970s, however, these terms gained a more specific referent—the new activism of the gay liberation movement. This novel threat of homosexual recruitment was highlighted by *Gay Lib v. Univ of Missouri*,

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130. *See The Defense of Marriage Act: Hearing before the Comm. on the Judiciary*, 104th Cong. 51, 53 (1996) (statement of David Zwiebel).

131. *See, e.g.*, ESKRIDGE, *supra* note 64, at 84 ("Homosexuals have an insatiable appetite for sexual activities and find special gratification in the *recruitment* to their ranks of youth") (quoting Florida Legislative Investigation Comm., Homosexuality and Citizenship in Florida (Tallahassee, Jan. 1964) in Johns Papers, Box 1, Folder 21) (emphasis added); KEN WORTHY, THE NEW HOMOSEXUAL REVOLUTION (1965) ("[I]f it is no longer a crime, there will be no deterrent at all to preventing the constant recruitment to its ranks of young men and women."); HERVEY MILTON CLECKLEY, THE CARICATURE OF LOVE: A DISCUSSION OF SOCIAL, PSYCHIATRIC, AND LITERARY MANIFESTATIONS OF PATHOLOGIC SEXUALITY 20, 29 (1957) (stating his "strong opinion that in homosexuals a tendency to seduce and indoctrinate is very common, and hence real and dangerous").

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a federal case that resulted in three published opinions during the late 1970s.[132]

Shortly after Stonewall, gay students across the country began forming organizations on college campuses.[133] In 1971, a small group calling itself Gay Lib applied for formal recognition as a student organization at the University of Missouri.[134] In the group's mission statement, the students expressed the intentions to "provide a dialogue between the homosexual and heterosexual members of the university community,"[135] "dispel the lack of information and develop an understanding of the homosexual,"[136] and "alleviate the unnecessary burden of shame felt by the local homosexual population."[137] Anticipating the University's objections, the students stressed that "Gay Lib does not seek to proselytize, convert, or recruit,"[138] and that "[a]s an educational group, Gay Lib does not advocate any violation of state statutes,"[139] including the state's sodomy law.

The University was not satisfied by Gay Lib's assurances. Denying the group's request, the University reasoned that "[t]here are potential or latent homosexuals, i.e. persons who come into adolescence or young adulthood unaware that they have homosexual tendencies,"[140] and that "[w]hat happens to a latent or potential homosexual from the standpoint of his environment can cause him to become or not to become a homosexual."[141] If Gay Lib were formally recognized, the University warned, such recognition would: "(1) . . . tend to reinforce the personal identities of the

132. Gay Lib v. Univ. of Missouri., 416 F. Supp. 1350 (W.D. Mo. 1976), *overruled by* 558 F.2d 848 (8th Cir. 1977), *cert. denied*, Ratchford v. Gay Lib, 434 U.S. 1080 (1978) (Rehnquist, J., dissenting).

133. Hunter, *supra* note 116, at 1702.

134. *Gay Lib*, 416 F. Supp. at 1354.

135. *Id*. at n.1.

136. *Id*.

137. *Id*.

138. *Id*. at n.2.

139. *Id*.

140. *Id*. at 1359.

141. *Id*.

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homosexual members of those organizations . . . ; (2) tend to cause latent or potential homosexuals who become members to become overt homosexuals; [and] (3) tend to expand homosexual behavior which will cause increased violations" of the state's sodomy law.[142]

Gay Lib filed suit in federal court, arguing that the University's decision violated the group's First Amendment rights.[143] The district court denied Gay Lib relief, based on the testimony of two psychoanalysts who predicted that formal recognition of the group would "tend to further homosexual behavior" and "promote such sexual conduct," thereby leading to violations of the state's sodomy law.[144] Like the University, the experts reasoned that the group was likely to reinforce the personal identities and behaviors of the group's members[145] because "wherever you have a convocation of homosexuals, . . . you are going to have increased homosexual activities."[146] The following year, the Eighth Circuit reversed, reasoning that the university's fears of advocacy and recruitment had not been sufficiently proved. In particular, the court found that there was "no historical or empirical basis"[147] for the testimony of the two experts, and that "none of the purposes or aims of Gay Lib . . . evidences advocacy of present violations of state law."[148]

The Supreme Court denied certiorari in *Gay Lib*, allowing the Eighth Circuit's ruling to stand.[149] In a dissent from this ruling, then-Justice Rehnquist articulated a remarkable example of the newly modernized fear of the queer child.[150] Although Justice Rehnquist acknowledged

142. *Id*. at 1358.

143. *Id.* at 1352.

144. *Id*. at 1368-69.

145. *See id*. at 1358.

146. *Id*. at 1369.

147. Gay Lib v. Univ. of Missouri, 558 F.2d 848, 854 (8th Cir. 1977).

148. *Id*. at 856.

149. Ratchford v. Gay Lib, 434 U.S. 1080 (1978).

150. *Id*. at 1080-86 (Rehnquist, J., dissenting).

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that Gay Lib had disclaimed any intention "to proselytize, convert, or recruit,"[151] he reasoned that the expert testimony had proven that "the meeting together of individuals who consider themselves homosexual in an officially recognized university organization can have a distinctly different effect from the mere advocacy of repeal of the State's sodomy statute."[152] The effect he was referring to, of course, was the spread of homosexuality across campus.

In an effort to explain why this risk was especially significant among college students, Justice Rehnquist then sought to establish a developmental link between "late adolescence" and "early adulthood": "As the University has recognized, this danger may be particularly acute in the university setting where many students are still coping with the sexual problems which accompany late adolescence and early adulthood."[153] To emphasize the virulent nature of homosexuality in this setting, he explained that from the University's point of view, the question of whether Gay Lib should be recognized was "akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measle sufferers be quarantined."[154] Although he did not explicitly delineate the mechanism through which homosexuality would be transmitted, he clearly implied that the group's advocacy of gay rights would lead more students to develop homosexual desires, engage in homosexual conduct, and identify as lesbian, gay, or bisexual.

By the time Rehnquist's dissent was published, Anita Bryant's warnings about "homosexual recruitment" were already national news. On January 18, 1977, Dade County, Florida had adopted a local ordinance prohibiting discrimination based on "sexual and affectional preference"

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151. *Id*. at 1083.

152. *Id*.

153. *Id*.

154. *Id*. at 1084.

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in employment, housing, and public accommodations.[155] In response, Bryant launched the "Save Our Children" campaign, an organized effort to repeal the ordinance by popular referendum.[156] In the annals of the LGBT movement, Bryant's campaign stands out as the clearest example of how opponents have invoked the fear of the queer child to frame the country's debates over LGBT rights. In addition, it marks the moment in which the opposition's new fear of indoctrination was nationalized and popularized. In the years that followed, this rhetoric gradually displaced the fear of seduction as a primary justification for anti-LGBT policies.

The twin pillars of Bryant's campaign were her repeated claims of "homosexual recruitment" and her specific focus on the vulnerability of children to the influence of openly gay teachers. In the campaign's opening press conference, Bryant held up a pamphlet on homosexuality that she claimed gay teachers had been distributing at local high schools.[157] In a series of media appearances, she repeatedly argued that "because homosexuals cannot reproduce, they must recruit."[158] Playing upon a national frenzy about "child pornography rings,"[159] the campaign produced a series of newspaper advertisements that sought to conflate homosexuality with pedophilia. In these ads, the campaign displayed slogans like, "Are Homosexuals Trying To Recruit Our Children?"[160] and "There Is No Human Right To Corrupt Our Children"[161] in bold print, above collages of old newspaper headlines in which men were accused of luring young boys into pornography and prostitution networks.

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155. FRED FEJES, GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA'S DEBATE ON HOMOSEXUALITY 2, 69 (2008).

156. *Id*. at 2-3.

157. CLENDINEN & NAGOURNEY, *supra* note 126, at 299.

158. *Id*. at 303.

159. JENKINS, *supra* note 52, at 124-25.

160. MARK D. JORDAN, RECRUITING YOUNG LOVE: HOW CHRISTIANS TALK ABOUT HOMOSEXUALITY 143 (2011).

161. CLENDINEN & NAGOURNEY, *supra* note 126, at 303-04.

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As this rhetoric reveals, Bryant's campaign often used the term "recruitment" as a bridge between the old fear of seduction and the new fear of indoctrination. Yet even as the campaign juxtaposed old and new threats, it subtly distinguished between them. In one press interview, Bryant remarked: "[T]he stories I could tell you about child recruitment and child abuse by homosexuals would turn your stomach."[162] Note the distinction: Bryant claims that "child recruitment" has the same effect as "child abuse," but she does not equate the two terms. In another advertisement, the campaign claimed that homosexuals were responsible for "a hair-raising pattern of *recruitment* and outright *seduction* and *molestation*," and warned voters that this pattern would "intensify" if the ordinances were permitted to stand.[163] By contrasting "recruitment" with "outright seduction and molestation," the campaign introduced Americans to a new theory of how queerness could spread. In a speech before the Kiwanis Club, Bryant emphasized that "the danger of the homosexual becoming a role model for our children" was not just "physical" but "psychological molestation," and claimed that the latter was "even more detrimental."[164]

The Save Our Children campaign was astonishingly successful. Only six months after the county's antidiscrimination ordinance was passed, it was repealed by voters in a two-to-one landslide.[165] The next day, the Florida Legislature passed the country's first law banning any "homosexual" person from adopting a child.[166] During the campaign, Bryant had garnered national media attention and attracted support from religious and conservative leaders, such as the Reverend Jerry Falwell and United States Senator Jesse Helms.[167]

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162. Kondracke, *supra* note 53, at 14 (emphasis added).

163. CLENDINEN & NAGOURNEY, *supra* note 126, at 304 (emphasis added).

164. JORDAN, *supra* note 46, at 143.

165. *See* ESKRIDGE, *supra* note 65, at 212.

166. *Id*.

167. *See id*. at 211; CLENDINEN & NAGOURNEY, *supra* note 126, at 300, 306.

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Bryant's campaign marked the beginning of a religious conservative backlash against the LGBT movement.[168] In the following year, similar campaigns were launched in Wichita, Kansas, St. Paul, Minnesota, and Eugene, Oregon, which led voters to repeal local anti-discrimination laws by similar margins.[169] Bryant's popularity faded after a series of protests and a strange interview in *Playboy* magazine, in which she claimed that homosexuals should be sent to prison "where they will have plenty of time to think," and she predicted that "Jews, Moslems, Pygmies, Egyptians, and atheists" would be condemned to hell.[170] But her early work in Dade County had established a template for opposition to the LGBT movement. In one form or another, religious conservatives have been replicating and refining Bryant's campaign since the late 1970s.[171]

Since Bryant's campaign, the fear of indoctrination has been most prominently featured in campaigns targeting LGBT teachers and students in public schools. Months after Bryant's victory in Florida, California Senator John Briggs announced his sponsorship of a ballot initiative prohibiting the employment of any public school employee who "engages in public homosexual activity and/or public homosexual conduct directed at, or likely to come to the attention of school children and/or other employees."[172] Under the terms of the initiative, "public homosexual conduct" was defined broadly to include "the advocating, soliciting, imposing, encouraging or promoting of private or public homosexual activity directed at, or likely to come to the attention of school children and/or other employees."[173] Briggs named his campaign "California Save Our Children," and he justified

168. *See* ESKRIDGE, *supra* note 65, at 211-12.

169. *See* FEJES, *supra* note 155, at 153-79.

170. In this interview, Bryant claimed that homosexuals should be sent to prison "where they will have plenty of time to think," added that "Jews, Moslems, Pygmies, Egyptians, and atheists" were going to hell, and admitted that she harbored hostile feelings toward her husband and men in general. *See id*. at 193; ESKRIDGE, *supra* note 65, at 212.

171. *See* CLENDINEN & NAGOURNEY, *supra* note 126, at 535.

172. ESKRIDGE, *supra* note 65, at 225.

173. *Id*.

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the initiative as an attempt to remove gay teachers from public schools: "What I am after is to remove those homosexual teachers who through word, thought or deed want to be a public homosexual, to entice young impressionable children into their lifestyle."[174]

By its own terms, however, the Briggs Initiative was more ambitious than the senator had acknowledged; it applied to both heterosexuals and homosexuals, and to the "advocacy" of homosexuality in public and private domains.[175] As a result, the law would have disqualified any teacher who expressed support for gay rights in a letter to the editor, or even in a private conversation with a co-worker.[176] Although early polls indicated that the initiative was likely to pass, it was defeated by a substantial margin of voters.[177]

In the 1990s, opponents of LGBT rights shifted toward a less ambitious campaign against the "advocacy" of homosexuality in public schools, lobbying for new restrictions on sex-education and AIDS-education programs.[178] In several states, legislatures adopted statutes that required teachers to emphasize that "homosexual conduct is not an acceptable lifestyle,"[179] and prohibited teachers from "promot[ing] a homosexual life-style"[180] in

174. FEJES, *supra* note 155, at 183.

175. Hunter, *supra* note 116, at 1703; Eskridge, *supra* note 5, at 1352.

176. Hunter, *supra* note 116, at 1703.

177. *Id.* at 1704. Even if the Briggs Initiative had passed, it would not have been likely to survive a constitutional challenge by gay teachers. In 1982, the Oklahoma Legislature passed a law that closely tracked the language of the Briggs Initiative, but the Tenth Circuit invalidated the law as a violation of the First Amendment. Nat'l Gay Task Force v. Bd. of Ed. Oklahoma City, 729 F.2d 1270 (10th Cir. 1984), *aff'd by equally divided court*, 469 U.S. 1203 (1985) (per curiam).

178. Eskridge, *supra* note 5, at 1359-60.

179. Health and Safety Code Revision Act, TEX. HEALTH & SAFETY CODE ANN. § 85.007(b)(2) (West 2001).

180. ARIZ. REV. STAT. ANN. § 15-716(C) (1999) (no school district may "promote[ ] a homosexual life-style" or "portray[] homosexuality as a positive alternative life-style").

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public schools.[181] Although federal courts have continued to invalidate these laws,[182] state legislatures have continued to pass them.[183]

Given that Bryant's campaign was successful in repealing a local anti-discrimination law, it is not surprising that opponents of LGBT rights have invoked her warnings of homosexual recruitment to target other anti-discrimination laws. During the 1980s and early 1990s, similar ballot initiatives were proposed in dozens of municipalities across the state, and an overwhelming majority of these initiatives were successful.[184] In many of these campaigns, opponents adopted Bryant's focus on the risk of gay teachers indoctrinating students into the "homosexual lifestyle."[185]

The most well-known of these initiatives was Colorado's Amendment 2, an amendment to the Colorado Constitution that repealed local anti-discrimination ordinances and prohibited the state legislature from passing a statewide anti-discrimination law.[186] Like other anti-gay political

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181. *See* ALA. CODE § 16-40A-2(c)(8) (LexisNexis 2001) (requiring sex education programs to emphasize that homosexuality is both socially unacceptable and a criminal offense); N.C. GEN. STAT. § 115C-81(el)(3) (2006) (prior to 2006 amendment) (requiring that education concerning sexually transmitted diseases include "the current legal status" of homosexual acts); UTAH CODE ANN. § 53A-13-101 (LexisNexis 2006) ("[P]rohibiting instruction in . . . the advocacy of homosexuality.").

182. *See, e.g.*, Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997).

183. *See, e.g.*, East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F. Supp. 2d 1166, 1197 & n.46 (D. Utah 1999) (citing Utah Code Ann. 53A-3-419, which prohibits local school boards from granting access to "any student organization or club whose program or activities would materially and substantially . . . involve human sexuality").

184. *See* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 257-60 (1997).

185. CLENDINEN & NAGOURNEY, *supra* note 126, at 299-305.

186. *See* Romer v. Evans, 517 U.S. 620, 623 (1996). Referring to the municipal ordinances, the Court writes:

> Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of 'homosexual, lesbian or bisexual orientation, conduct, practices or relationships.' [In addition,] [i]t prohibits all legislative, executive or judicial action at any level of state

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campaigns, the campaign for Amendment 2 was multi-faceted, including a wide range of arguments against protecting lesbians and gay men from discrimination in employment, housing, and other domains.[187] Predictably, though, these appeals included warnings about the threat of homosexual recruitment. In one pamphlet, for example, Colorado for Family Values suggested that gay teachers were already indoctrinating children in the state's schools: "Homosexual indoctrination in the schools? IT'S HAPPENING IN COLORADO!"[188]

D. *Role Modeling*

In addition to popularizing the fear of "homosexual recruitment," Anita Bryant's campaign introduced a subtler theme into the anti-LGBT rhetoric of the 1970s—the notion that an openly gay teacher would serve as a "role model" who would subtly influence children's sexual development. As Bryant herself explained, the campaign was aware that some voters had been skeptical of her most strident claims, "[b]ut we also kn[e]w that many tolerant, broad-minded citizens voted for repeal because they felt uneasy at the

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or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians.

187. *See, e.g.*, STEPHEN BRANSFORD, GAY POLITICS VS. COLORADO AND AMERICA: THE INSIDE STORY OF AMENDMENT 2, at 15-17 (1994) (claiming that anti-discrimination laws infringe on "the right *not* to associate with homosexuals," improperly subject "landlords and employers [to] lawsuit for dismissing . . . . failing to rent to or hire a homosexual," "make the courts the public solution to private problems," and give "homosexuality the legal power to force the rest of the state to affirm their lifestyle").

188. Colorado for Family Values, *Equal Rights—Not Special Rights*, at 2 (1992), *reprinted in* Robert Nagel, *Playing Defense*, 6 WM. & MARY BILL RTS. J. 167, 193 (1997). Amendment 2 was subsequently invalidated by the U.S. Supreme Court in 1996. *Romer*, 517 U.S. at 620.

Although the fears that children will be recruited, indoctrinated, or proselytized into homosexuality have been primarily aimed at LGBT teachers, they have also appeared in visitation cases involving lesbian and gay parents. *See* Clifford J. Rosky, *Like Father, Like Son: The Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 294-95 (2009) (citing *In re* J.S. & C., 324 A.2d 90, 95-96 (N.J. Super. Ct. Ch. Div. 1974) [hereinafter Rosky, *Like Father, Like Son*]; Hertzler v. Hertzler, 908 P.2d 946, 949 (Wyo. 1995)).

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prospect of an avowed homosexual becoming a role model for their children."[189]

Like the fear of recruitment, the fear of role modeling has played a prominent role in justifications for anti-LGBT policies since Stonewall. Only two days after Bryant's campaign was launched, the discourse of role modeling was adopted by the Washington Supreme Court in a case upholding the dismissal of a teacher "because he was a known homosexual."[190] To justify this ruling, the court emphasized that the teacher's "homosexual conduct must be considered in the context of his position of teaching high school students."[191] The court reasoned that the teacher's homosexuality created the "danger of encouraging expression of approval and of *imitation*" because "[s]uch students could treat the retention of the high school teacher by the school board as indicating adult approval of homosexuality."[192]

In the ensuing decades, the role modeling fear has served as the primary justification for laws that target LGBT parents, such as statutes prohibiting lesbian and gay people from adopting. In 1987, the New Hampshire House of Representatives proposed a bill banning "homosexuals . . . from participating in governmentally sanctioned programs of adoption, foster care, and day care" on the ground that "the provision of a healthy environment and a role model for children should exclude homosexuals."[193]

Before voting on the bill, the House asked the Justices of the New Hampshire Supreme Court to offer an advisory opinion about whether it was constitutional.[194] In response, four of the five justices issued an opinion indicating that the constitutionality of the law depended on the empirical

189. ANITA BRYANT, THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY 126 (1977).

190. Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1341, 1347 (Wash. 1977).

191. *Id*. at 1347.

192. *Id*. (emphasis added).

193. *In re* Opinion of the Justices, 530 A.2d 21, 23 (N.H. 1987).

194. *Id*. at 22.

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plausibility of the legislature's role modeling fear.[195] On the one hand, the justices found that the statute's exclusion of homosexuals from the state's adoption and foster care programs was constitutional, because it was "rationally related" to the state's legitimate interest in "provid[ing] appropriate role models."[196] Although they recognized that there was some disagreement about homosexuality's origins, they observed that "the source of sexual orientation . . . is thought to be a combination of genetic and environmental influences."[197] The justices reasoned: "Given the reasonable possibility of environmental influences, the legislature can rationally act on the theory that a role model can influence the child's developing sexual identity."[198]

The justices balked, however, at applying "the role model theory" to the employment of day-care providers. In their view, "this theory most likely holds true in the parent-child or other familial context" because parents have "custody of and control over the children so placed."[199] They were not persuaded, however, that the role modeling theory would hold true in the day-care context, because they found that the "non-continuous nature of the provision of many day-care services" was roughly comparable to "the non-continuous nature of the supervision of children involved in teaching."[200]

Such reasoning may explain why courts have applied role-modeling fears primarily to LGBT parents, rather than LGBT teachers. In 1993, a Florida appeals court invoked a subtler version of the role-modeling fear to justify the state's adoption law, even as it disavowed the fear that a gay parent would "'teach' a child to become a homosexual."[201]

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195. *Id.* One of the four Justices joining the opinion was Justice David Souter, a future Justice of the United States Supreme Court. *Id.*

196. *Id*. at 25.

197. *Id*.

198. *Id*.

199. *Id*.

200. *Id*.

201. Florida Dep't of Health & Rehab. Servs. v. Cox, 627 So. 2d 1210, 1220 (Fla. Dist. Ct. App. 1993).

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The court reasoned that because "a very high percentage of children available for adoption will develop heterosexual preferences," it was important for the state to provide children with "heterosexual role models," so adoptive parents could give children "education and guidance" by "telling stories about their own adolescence and explaining their own experiences with the opposite sex."[202] While the court emphasized that it was not relying on the fear of homosexual recruitment, it nonetheless insisted on the importance of providing children with heterosexual role models: "Without reliance upon any unsubstantiated notion that a homosexual parent could 'teach' a child to become a homosexual, . . . the legislature may still decide that the best interests of children require that they be adopted by persons who can and will serve as heterosexual role models."[203]

In 2004, the Eleventh Circuit revived this logic in another decision upholding the constitutionality of Florida's adoption law. In *Lofton v. Secretary of Department of Children & Family Services*,[204] the State of Florida claimed that the adoption law was justified by the "vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling."[205] Invoking the reasoning of the state appellate court's earlier ruling, the Eleventh Circuit held that the law was supported by "the influence of environmental factors in forming patterns of sexual behavior and the importance of heterosexual role models."[206]

Throughout the post-Stonewall era, the rhetoric of role modeling has played an equally prominent part in custody and visitation cases involving lesbian and gay parents. In 1981, a Tennessee appellate court removed custody from a lesbian mother, based on a psychologist's testimony that it would be "preferable" to raise Rusty, a four-year-old boy, in

202. *Id*.

203. *Id*.

204. 358 F.3d 804 (11th Cir. 2004), *reh'g denied*, 377 F.3d 1275 (2004).

205. *Id*. at 818.

206. *Id*. at 822.

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"a normal relationship wherein males and females adhere to their roles"—as opposed to "a homosexual relationship involving a mother in a submissive role"—because "homosexuality is a learned trait and it would be very difficult for Rusty to learn and approximate sex role identification from a homosexual environment."[207] In 1982, a Missouri appellate court restricted a gay father's visitation rights on the ground that the father had "directly testified that he thought it would be 'desirable' for his child to become a homosexual," and had "furnished the boy with role models consistent with that approbation."[208] In 1985, a New York appellate judge concurred in a decision to restrict a gay father from involving his child "in any homosexual activities or publicity" during his visits, on the ground that "a child's sexual maturation and sense of sexual security must be safeguarded so that the child will have a proper identification as to what the parents' role model should be."[209] In another 1985 case, a Tennessee appellate court denied a lesbian mother custody of her daughter on the ground that "the homosexual parent and the minor child are both female," reasoning that "we consider this factor particularly important because of the increased chance of role-modeling."[210]

In *Dale v. Boy Scouts of America*,[211] the Supreme Court recognized the fear of role modeling not as a justification for the state's anti-LGBT policies, but as a private organization's defense against the government's enforcement of antidiscrimination laws.[212] In this well-known case, the Boy Scouts had revoked the membership of a scoutmaster named James Dale, in response to a newspaper interview in which Dale had explained "his

207. Dailey v. Dailey, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981).

208. J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 869 (Mo. Ct. App. 1982).

209. Gottleib v. Gottleib, 488 N.Y.S.2d 180, 182 (N.Y. App. Div. 1985) (Kassal, J., concurring).

210. Bennett v. O'Rourke, 1985 WL 3464, at *3 (Tenn. Ct. App. Nov. 5, 1985).

211. 530 U.S. 640, 652-53 (2000).

212. In Eskridge's terms, the *Dale* ruling represents the "privatization" and "constitutionalization" of the opposition's "no promo homo" claims. *See* Eskridge, *supra* note 5, at 1355-56, 1408-09.

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advocacy of homosexual teenagers' need for gay role models."[213] In upholding the Boy Scouts' constitutional right to terminate Dale on this basis, the Supreme Court repeatedly emphasized the organization's interest in preventing gay men from serving as "role models."[214] In particular, the Court relied on one of the organization's statements that "homosexuals do not provide a desirable role model for Scouts."[215]

### E. *Public Approval*

Throughout this period, indoctrination and role modeling fears have been supplemented with an even subtler worry about children's sexual development—the idea that the government's recognition of LGBT rights sends a signal that the public approves of queerness. While some opponents of LGBT rights claim that this dynamic could potentially influence a person's sexual behavior at any age, they often insist that children are especially vulnerable to the influence of state actors and policies.[216] The fear of public approval has been especially common in debates over sodomy and marriage laws, which are widely viewed as potent symbols of the public's moral stance toward homosexual relations and relationships.[217]

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213. *Dale*, 530 U.S. at 645.

214. *Id*. at 652, 674.

215. *Id*. at 652; *see also id.* ("The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization. We do not believe that homosexuals provide a *role model* consistent with these expectations.").

216. GEORGE CHAUNCEY, WHY MARRIAGE? 153 (2004) ("[E]vangelicals are more likely to fear that any government, religious, or media legitimization of homosexuality threatens the stability of heterosexuality itself by making homosexuality seem a more acceptable, even appealing choice. They worry especially about youth being exposed to such temptation, so take great care to prevent their children from having any exposure to gay people.").

217. I thank Michael Boucai for introducing me to the phrase "homosexual relations and relationships" and for emphasizing the independent value of an individual's liberty to pursue relations and relationships. *See* Boucai, *supra* note 3, at 417 (arguing that "[t]he constitutional right to choose homosexual relations and relationships is a universal freedom and inheres whatever one's desire or disposition to exercise it").

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Only a few months after the Stonewall riots, California Senator Willie Brown introduced the country's first law specifically designed to legalize sodomy and other private sexual activities between consenting adults.[218] It was rejected each year until 1975, when it became the first bill in the state's history to pass the Senate by a single vote.[219] Speaking in opposition to the bill, one senator remarked that the bill's passage would send a message to children that "homosexuality is okay,"[220] and another said that sodomy was not a victimless crime because "children might look upon homosexuality as acceptable" which "would harm future generations."[221]

Because the institution of marriage has tremendous symbolic significance, the rhetoric of public approval has been especially prominent in debates about same-sex marriage. In the congressional debates over the federal Defense of Marriage Act,[222] the bill's sponsors explicitly conjured an image of Congress speaking to the country's youth, and strongly signaled that the bill was designed to channel children into heterosexual relationships. Representative Charles Canady, one of the bill's chief sponsors, made this objective especially clear by posing a series of rhetorical questions about what lessons Congress should impart to "the children of America":

> Should this Congress tell *the children of America* that it is a matter of indifference whether they establish families with a partner of the opposite sex or cohabit with someone of the same sex? Should this Congress tell *the children of America* that we as a society believe there is no moral difference between homosexual relationships and heterosexual relationships?[223]

In a legislative report supporting the bill, Representative Canady cautioned Congress "against doing

218. *Sex Bill Passes in Historic Tie-Breaker*, ADVOCATE, May 21, 1975, at 4.

219. *Id*.

220. *Id*. (quoting Sen. H.L. Richardson).

221. *Id*.

222. 110 Stat. 2419 (Sept. 21, 1996), *codified at* 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

223. 104 CONG. REC. H7491 (1996) (statement of Rep. Charles Canady).

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anything which might mislead *wavering children* into perceiving society as indifferent to the sexual orientation they develop," in order to protect society's interest "in reproducing itself."[224] Similar warnings have been sounded by judges defending the constitutionality of laws against same-sex marriage,[225] and in the broader public debates about the legalization of same-sex marriage.[226]

### F. *The Fear's Many Forms*

By denoting the fears of indoctrination, role modeling, and public approval with separate terms, I do not mean to suggest that they can be easily untangled in practice, or even in principle. As a practical matter, all three of these fears are voiced alongside each other more often than they

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224. H.R. No. 104-664, at 15 n.53 (quoting E.L. Pattullo, *Straight Talk About Gays*, COMMENT. 21 (1992)).

225. *See, e.g.*, Dean v. District of Columbia, 653 A.2d 307, 355 (D.C. Ct. App. 1995) (assuming that the state has a "substantial, if not compelling" interest in prohibiting same-sex marriage "because of a concern that such marriages, if deemed legitimate, could influence the sexual orientation and behavior of children, to the extent choice plays a role").

226. *See, e.g.*, Trayce Hansen, *Love Isn't Enough: 5 Reasons Why Same-Sex Marriage Will Harm Children*, DRTRAYCEHANSEN.COM (Oct. 15, 2007), http://www.drtraycehansen.com/Pages/writings_samesex.html (last visited May 7, 2013) ("[S]ame-sex marriage will increase sexual confusion and sexual experimentation by young people. The implicit and explicit message of same-sex marriage is that *all* choices are equally acceptable and desirable. So, even children from traditional homes—influenced by the all-sexual-options-are-equal message—will grow up thinking it doesn't matter whom one relates to sexually or marries. Holding such a belief will lead some—if not many—impressionable young people to consider sexual and marital arrangements they never would have contemplated previously."); William J. Bennett, *Gay Marriage: Not a Very Good Idea*, WASH. POST, May 21, 1996, at A19 ("There are other arguments to consider against same-sex marriage—for example, the signals it would send, and the impact of such signals on the shaping of human sexuality, particularly among the young.").

Most recently, the public approval fear has been invoked by opponents of anti-bullying initiatives in public schools. *See, e.g.*, Kim Severson, *Christian Group Finds Gay Agenda in an Anti-Bullying Day*, N.Y. TIMES, Oct. 15, 2012, at A15 (reporting that the American Family Association objected that an anti-bullying program known as "Mix It Up at Lunch Day," which encourages students "to hang out with someone they normally might not speak to," was actually "a nationwide push to promote the homosexual lifestyle in public schools").

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are disaggregated. In *Gay Lib*, for example, the University objected that granting formal recognition to the group would "constitute an implied *approval* by the University of the abnormal homosexual life-style as a normal way of life and would be so understood by many students," and worried that "homosexuals will *counsel* other homosexuals,"[227] which would lead them to engage in illegal acts. Similarly, in *Gaylord*, the court juxtaposed the dangers of "imitation" and "approval."[228] In one custody case, a Pennsylvania court managed to convey all three fears in a single sentence, when it claimed that awarding custody to an openly lesbian mother would "require the children to accept their mother's role, and to some extent, . . . proselytize the children by indicating that because of the role model now found acceptable, it is a suitable life style for the children."[229] In this passage, the court imagines itself sending a signal of public approval, which effectively "proselytizes" the children by identifying a lesbian mother as an appropriate "role model."

Even in analytical terms, these three fears cover similar ground. However they are framed, they are all based on the same basic fear of children's queerness, which has been voiced in a variety of ways through the ages. In this sense, any pro-LGBT reform could be criticized as a form of indoctrination, role modeling, or public approval—and at one time or another, it is likely that every pro-LGBT reform has been characterized in such terms. In Bryant's campaign, for example, she objected to Dade County's anti-discrimination law because it offered gay teachers the opportunity to not only "recruit" children, but to serve as a "role model," and to signal "public approval" of the "homosexual lifestyle."[230] This is one of the principal strengths that opponents derived from the fragmentation of the fear during this period: instead of relying on concrete claims about men sexually molesting boys, they were able to

227. Gay Lib v. Univ. of Missouri, 416 F. Supp. 1350, 1359 (W.D. Mo. 1976).

228. Gaylord v. Tacoma Sch. Dist., 559 P.2d 1340, 1347 (Wash. 1977).

229. Constant A. v. Paul C.A., 496 A.2d 1, 8 (Pa. Super. Ct. 1985).

230. *See* discussion *supra* Part III.D.

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invoke a much broader, more diverse range of theories to justify discrimination against LGBT people.

### G. *The Return of the Gender-Variant Child*

In recent years, the fear of the queer child has begun to shift in ways that closely track Siegel's "preservation-through-transformation" model of the evolution of status regimes. During the 1990s, opponents of LGBT rights shifted away from explicit claims about children's homosexuality, in favor of increasingly vague claims about children's variance from traditional gender roles and identities.[231] Although this development has been especially evident in custody cases involving boys raised by lesbian mothers, it has also surfaced in constitutional challenges to same-sex marriage bans and public debates over the Employment Nondiscrimination Act.

In the long arc of history, this trend is decidedly recent, but it reminds us that anything old can be new again: after all, the specific fear of children becoming "homosexual" is barely more than a century old, and even now, it is routinely conflated with parallel fears of children becoming gender variant. In this sense, this trend presents a return to much earlier ideas about the relationship between sexuality and gender, rather than the emergence of a distinctly new set of ideas and fears. As Siegel reminds us, the justifications for status regimes are often recycled, through a process of translation into less contested, more socially acceptable terms.[232]

As early as the 1990s, the fear of role modeling was often expressed as a specific concern that boys raised by lesbian mothers will experience "gender identity problem[s]."[233] In a 1990 case, for example, the Louisiana

231. Although gender identity is a distinct concept from gender roles, the two ideas are often conflated by opponents of LGBT rights. *See, e.g.*, Carlos Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 705 (2003) (observing that judges often conflate "gender identity" and "gender roles" in cases involving same-sex adoptions).

232. Siegel, *supra* note 108, at 2179.

233. Pleasant v. Pleasant, 628 N.E.2d 633, 639 (Ill. App. Ct. 1993).

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court cited a psychologist's concerns that if a two-year-old boy were raised by his lesbian mother, the boy may not learn "masculine and female" roles, which the psychologist referred to as "sex appropriate roles."[234] At a hearing on the mother's visitation rights, the psychologist explained: "I would be concerned if the role models were confused so that a child would not understand or know that this was not typical or usual or to be expected."[235] The court awarded primary custody to the father, based on a specific finding that "the child is of an age where gender identity is being formed."[236]

As the millennium turned, the role modeling fear began to surface in judicial opinions upholding state laws against same-sex marriage—and here, too the claim was framed as a fear about children's gender roles rather than children's sexual identity, desire, or behavior. In 1999, the State of Vermont argued that the state's law against same-sex marriage was justified by the government's interest in "'promoting child rearing in a setting that provides both male and female role models.'"[237] Although the Vermont Supreme Court rejected this logic, it conceded that this was "[t]he most substantive of the State's remaining claims," and that "[i]t is conceivable that the Legislature could conclude that opposite-sex partners offer advantages in this area."[238] Rather than denying that this goal was legitimate, the court held that it was not consistent with Vermont's other statutes, such as a law that allowed children to be jointly adopted by same-sex couples.[239]

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234. Lundin v. Lundin, 563 So. 2d 1273, 1275 (La. Ct. App. 1990).

235. *Id*.

236. *Id*. at 1277; *see also Pleasant*, 628 N.E.2d at 639 (finding that exposing a boy to "gays and lesbians was endangering his gender identity and morals").

237. Baker v. State, 744 A.2d 864, 884 (Vt. 1999).

238. *Id*.

239. *Id*. at 884-85. As some scholars have noted, opponents of same-sex marriage are often reluctant to specify the particular advantages bestowed by "male and female role models," but the term "role model" strongly implies that children learn gender roles from parents of the same sex. Deborah A. Widiss, Elizabeth N. Rosenblatt & Douglas NeJaime, *Exposing Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 489-92 (2007).

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In custody and visitation cases, the rhetoric of role modeling seems to have waned in recent years, but it has not disappeared yet. In 2007, a Louisiana Supreme Court removed custody from a lesbian mother, based in part on the father's concern that "kids raised by lesbian parents are more likely to grow up lesbian," and a court therapist's testimony that the mother's "lesbian partner would distort the children's (especially the girls') perception of female role models."[240]

When searching for explanations of this rhetorical shift, it is hard to ignore the striking parallels between law and psychiatry on this subject: in the same DSM edition that the APA abandoned the classification of homosexuality as a mental disorder, the organization introduced a new diagnosis known as "Gender Identity Disorder of Childhood."[241] In the early 1990s, expert witnesses began introducing this new diagnosis into custody and visitation cases, much to the detriment of lesbian and gay parents.[242]

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In a dissenting opinion in Goodridge v. Dep't Public Health, 798 N.E.2d 941, 999 n.27, 1000 (Mass. 2003) (Cordy, J., dissenting), Justice Cordy made this reasoning clearer than most when he argued that "same-sex couples . . . cannot provide children with a parental authority figure of each gender," and noting that one study found "significant statistical differences in . . . gender roles [and] sexual behavior" among children raised by lesbian and gay parents. In 2006, New York's highest court upheld the state's law against same-sex marriage through a similar logic: "The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like." Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006).

240. Cook v. Cook, 965 So. 2d 630, 633-34 (La. Ct. App. 2007); *see also* Holmes v. Holmes, 255 S.W.3d 482, 486 (Ark. Ct. App. 2007) (removing custody from lesbian mother based partially on boy's nonconformity with traditional gender norms).

241. LAWRENCE D. MASS, 1 HOMOSEXUALITY AND SEXUALITY: DIALOGUES OF THE SEXUAL REVOLUTION 214 (1990); Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay: The War on Effeminate Boys*, *in* TENDENCIES 156-57 (Eve Kosofsky Sedgwick ed., 1993); Kenneth J. Zucker & Robert L. Spitzer, *Was the Gender Identity Disorder of Childhood Diagnosis Introduced into DSM-III as a Backdoor Maneuver to Replace Homosexuality? A Historical Note*, 31 J. SEX & MARITAL THERAPY 31, 32 (2005).

242. *See, e.g.*, Pleasant v. Pleasant, 628 N.E.2d 633, 637-41 (Ill. App. Ct. 1993); Lundin v. Lundin, 563 So. 2d 1273, 1275 (La. Ct. App. 1990); *see also* Rosky,

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But we should be careful not to lay this development at psychiatry's doorstep, for it is likely a sign of broader forces at work. The most notable are the enduring disjunction between public attitudes about homosexuality and gender variance and the related gap between the progress made by the gay and transgender movements.

In recent years, this dynamic was vividly illustrated in the debates over the federal Employment Nondiscrimination Act (ENDA), a bill to prohibit discrimination based on sexual orientation and gender identity in employment. In 2008, Representative Barney Frank introduced an alternative version of ENDA that excluded "gender identity" from the bill's anti-discrimination protections.[243] In defending this move, the openly gay congressman explained that he had marshaled enough votes to pass protections for "sexual orientation" through the House of Representatives, but a group of swing voters had objected to the inclusion of transgender workers within the bill's protections.[244] In a remarkable sign of the transgender movement's progress, more than 300 LGBT groups withdrew support for Frank's limited bill, which he was forced to amend.[245]

Ironically, however, the new solidarity of the gay and transgender movement has provided opponents of LGBT rights with a new target in attacks on ENDA, and a new way of articulating Anita Bryant's indoctrination fears. In 2010, the Traditional Values Coalition (TVC) launched

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*Like Father, Like Son*, *supra* note 188, at 305-07 (analyzing the frequency of gender development stereotypes in custody and visitation cases involving lesbian and gay parents).

243. Russell Berman, *Transgender Anti-discrimination Bill Becomes Tough Sell for Centrist Dems*, THE HILL (May 5, 2010, 5:56 PM), http://www.thehill.om/homenews/house/96745-transgender-anti-discrimination-bill-becomes-tough-sell-for -centrist-democrats.

244. *Id.* In fact, the bill was approved by the House of Representatives by a vote of 235 to 184, but it was not voted upon by the Senate. In 2009, the bill was once again amended to include gender identity protections. *See* WILLIAM RUBENSTEIN ET AL., SEXUAL ORIENTATION AND LAW 423 (4th ed. 2012).

245. *NLG Queer Committee Supports HRC Dinner Protestors*, NLGSF.ORG, www.nlgsf.org/content/nlg-queer-committee-supports-hrc-dinner-protestors (last visited Mar. 14, 2013).

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"ENDA Hurts Kids," a campaign against the passage of ENDA, in anticipating of an upcoming congressional vote. In a banner across the campaign's homepage, the TVC asked: "Do you want men dressed as women teaching your kids?"[246] In lieu of an answer, the organization issued the following alert to the American public:

> **Under the so-called, Employment Non-Discrimination Act (ENDA), your children will be trapped in classes taught by drag queens and transgender activists.** Students will be indoctrinated that "alternative lifestyles" are no different than traditional lifestyles. Young children will be forced to learn about bizarre sexual fetishes—and you will have no say in the matter.[247]

"If ENDA becomes law," the TVC warned, "she-male activists and cross-dressing teachers will hold your child hostage in the classroom."[248] "Once this happens, every homosexual, bisexual, and transgender teacher will have free reign to indoctrinate our children into accepting these 'alternative lifestyles' as normal and good."[249]

While it may be tempting to dismiss the TVC's rhetoric as a vestige of a bygone era, the campaign managed to focus the media's attention on ENDA's protections for transgender teachers. One month after the campaign was launched, CBS News featured an online debate between Andrea Lafferty, the TVC's President, and Allyson Robinson, the Human Rights Campaign's leading spokesperson on transgender issues. In a segment titled "Debate Over Transgender Teachers," reporter Nancy

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246. *The Issues*, TRADITIONAL VALUES COALITION (Mar. 13, 2010), http://web.archive.org/web/20100313120658/http://www.endahurtskids.com/issues/ (accessed by searching for www.endahurtskids.com in the Internet Archive index).

247. *Home*, TRADITIONAL VALUES COALITION (Mar. 13, 2010), http://web.archive.org/web/20100313120658/http://www.endahurtskids.com/issues/ (accessed by searching for www.endahurtskids.com in the Internet Archive index).

248. *Why It Matters*, TRADITIONAL VALUES COALITION (Mar. 13, 2010), http://web.archive.org/web/20100313120658/http://www.endahurtskids.com/issues/ (accessed by searching for www.endahurtskids.com in the Internet Archive index).

249. *The Issues*, *supra* note 246.

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Cordes introduced the subject by describing ENDA as a law that "would protect employees on the basis of sexual orientation or gender identity, including transgender and transsexual teachers."[250] Throughout this ten-minute segment, Lafferty repeatedly claimed that ENDA would deny children a "safe environment"[251] by requiring them to hire transgender teachers, that gender identity disorder was a "mental disorder,"[252] and that it would be "very confusing"[253] for children to be taught by transgender teachers.

It is surely a sign of the times that thirty years after Bryant's campaign, Andrea Lafferty now targets *transgender* teachers, rather than lesbian, gay, or bisexual teachers. Sensing that some things have changed since the 1970s—and yet, that other things haven't—Lafferty claims that children would be "confused" by transgender teachers, much as Bryant claimed that children would be "confused" by the presence of "avowed homosexual teachers." In fact, when the reporter specifically asked Lafferty whether she would object to limited protections for *gay* teachers, Lafferty deftly avoided taking any position on that issue by referring back to the LGBT movement's internal controversy over the inclusion of gender identity protections in ENDA:

> Reporter: If you take the transgender piece out of it, where do you stand on sexual discrimination against gays and lesbians?
>
> Lafferty: Well, you can't do that because there is a commitment by the gay and transgender community and the leadership of this Congress that it will be a package. So we can only discuss ENDA in relation to gender identity remaining in the bill.[254]

Even as Lafferty illustrates the movement's striking progress since Stonewall, she testifies to the flexibility and durability of the fear of the queer child.

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250. *Debate Over Transgender Teachers*, CBS NEWS, at 0:10, *available at* http://www.cbsnews.com/video/ watch/?id=6414895n.

251. *Id.* at 2:25; 6:58; 8:36.

252. *Id.* at 2:39; 9:17.

253. *Id*. at 3:06; 7:08.

254. *Id*. at 9:18-9:40.

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## IV. JUST THE FACTS?

During Bryant's crusade in Florida, gay activists struggled with how to answer her charges of child molestation and recruitment.[255] Initially, they hoped to ignore these claims, rather than giving them the publicity and dignity of a formal response.[256] But as the vote grew closer, they felt compelled to defend themselves. In the campaign's final days, a coalition of advocates ran two full-page newspaper ads that sought to counter Bryant's "myths and lies" with statistics from scientific and legal authorities, and they flew in a team of leading psychiatrists and psychologists.[257] At a press conference, the experts told reporters that "homosexuality has nothing to do with child molestation," there was "no evidence" that children's sexual development could be influenced by "homosexual role models," and that "sexual orientation was established at a young age, by three or four, before children entered school."[258]

In the years that followed, this strategy was widely adopted by activists, lobbyists, and litigators in the LGBT movement.[259] With near unanimity, LGBT advocates have challenged the fear of the queer child on strictly empirical grounds.[260] In legislatures, courtrooms, and media

255. *See* FEJES, *supra* note 155, at 98-99, 139.

256. *Id*. at 139.

257. *Id.* at 139; CLENDINEN & NAGOURNEY, *supra* note 126, at 304-05.

258. FEJES, *supra* note 155, at 126; CLENDINEN & NAGOURNEY, *supra* note 126, at 304-05.

259. The question of how to define the LGBT movement is admittedly complex, as it raises a host of "theoretical and empirical questions about movement boundaries." Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 675 (2012). A full treatment of these questions is beyond this Article's scope. For present purposes, it is sufficient to clarify that when this Article uses the phrase "LGBT movement," it refers widely to the group of activists, litigators, and lobbyists who identify themselves as part of a broader movement for LGBT equality or LGBT rights.

260. The near unanimity of this view among activists, lawyers, and scholars has been noted by scholars on both sides of debates over same-sex marriage and LGBT parenting. *See* Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 160 (2001) ("This body of research, almost uniformly, reports findings of no notable differences

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appearances, they have argued that most child molestation is heterosexual, sodomy laws have nothing to do with children, marriage laws have nothing to do with schools, and children raised by lesbian and gay parents are no different than children raised by heterosexual parents. Above all, advocates have insisted that children's sexual orientation and gender identity are fixed early in life and cannot be learned, taught, chosen, or changed.

In pursuing a strictly empirical response to the fears of indoctrination, role modeling, and public approval, the LGBT movement has run headlong into two basic challenges. The first challenge is that even after decades of study, the causes of homosexuality and gender variance remain mysterious.[261] The American Psychological Association frankly acknowledges this fact: "[A]lthough much research has examined the possible genetic, hormonal, developmental, social, and cultural influences on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined

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between children reared by heterosexual parents and those reared by lesbian and gay parents . . . ."); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 837 (1997) (observing that the "unanimity" of this opinion is "remarkable").

While it is always difficult to prove an absence, my review of the historical literature on the LGBT movement has revealed only a handful of LGBT advocates who bucked this trend before the new millennium. These exceptions are discussed infra in Part V, Section A. On the history of the LGBT movement, see generally, ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS (2006); CHAUNCEY, *supra* note 216; CLENDINEN & NAGOURNEY, *supra* note 126; MARTIN DUPUIS, SAME-SEX MARRIAGE, LEGAL MOBILIZATION, AND THE POLITICS OF RIGHTS (2002); ESKRIDGE, GAYLAW, *supra* note 82; LINDA HIRSHMAN, VICTORY: THE TRIUMPHANT GAY REVOLUTION (2012); DANIEL PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE (2006); Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993). In my previous work, I have more thoroughly documented a similar trend in the specific context of custody and visitation cases involving one lesbian, gay, or bisexual parent and one heterosexual parent. *See* Rosky, *Like Father, Like Son*, *supra* note 188, at 330 & n.413 (citing sources).

261. *See* Rosky, *Like Father, Like Son*, *supra* note 188, at 330; *see also* SEDGWICK, *supra* note 11, at 40 (arguing that "any such adjudication [between nature and nurture] is impossible to the degree that a conceptual deadlock between the two opposing views has by now been built into the very structure of every theoretical tool we have for undertaking it").

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by any particular factor or factors. Many think that nature and nurture both play complex roles."[262] Whenever a new study is published, a new theory ascends—identical twins, pheromones, fraternal birth order, hypothalamus, or the ever-elusive "gay gene."[263] But the nature/nurture debate is not over, and it does not seem likely to end in the foreseeable future.

The second challenge is that, as Professor Janet Halley once wrote, "anti-gay public policy is complex and flexible, and finds ways to justify itself even on the assumption that homosexual orientation in many, most, or all its bearers is immutable."[264] Over the course of centuries, the fear of the queer child has proved to be a remarkably nimble adversary—broad, subtle, and manifold. It encompasses concerns about children's sexuality and gender, and within each of these categories, it includes concerns about children's thoughts, behaviors, and identities. Like the facts it describes, the fear is a moving target; it is hard to pin down and dispute on empirical grounds.

This Part distinguishes sharply between the LGBT movement's strategic position vis-à-vis the old and new versions of the fear. Because the act of child sexual abuse is inherently harmful, there is only one plausible response to the seduction fear: LGBT advocates must insist that the fear is empirically false, because LGBT people are not child molesters. In this instance, it does not matter whether seduction makes children more likely to be queer, because adult-child sex is per se harmful, regardless of whether it causes anyone to be queer. But the fears of indoctrination, role modeling, and public approval do not allege that children suffer any independent harms—i.e., anything apart from the supposed harm of queerness itself. As a result, LGBT advocates have an opportunity to develop other responses to these fears. Instead of challenging the

262. AM. PSYCHOLOGICAL ASS'N, ANSWERS TO YOUR QUESTIONS: FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION AND HOMOSEXUALITY 2 (2008).

263. *See, e.g.*, Neil Swidey, *What Makes People Gay?*, BOSTON GLOBE, Aug. 14, 2005 (Magazine), at 38.

264. Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 567 (1994).

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empirical premise that queerness can spread from adult to child, they can challenge the normative premise that children are better off straight.

Without gainsaying the advantages and achievements of strictly empirical challenges, this Part argues that the time has come for the LGBT movement to advance normative claims on behalf of children's queerness. In recent years, as the opposition's responses have become more sophisticated, and the movement's goals have become more ambitious, the empirical paradigm of advocacy has begun to falter. In one situation after another, when the empirical strategy is deployed against indoctrination, role modeling, and public approval fears, it runs up against the inherent uncertainty and incompleteness of the factual record. As a result, LGBT advocates have struggled with how best to answer the fear, which has resulted in a handful of awkward and unsatisfying exchanges between advocates and opponents. This Part identifies two such moments in debates about indoctrination and role modeling, in the hopes of persuading LGBT advocates to pursue a more comprehensive attack on the fear's premises.

### A. *Seduction: Debunked by Data?*

In judicial opinions, the most infamous example of the seduction fear appeared in *J.L.P.(H.) v. D.L.P.*, a 1982 divorce case involving a gay father.[265] In this case, a trial court found that the father's conduct toward his son had been "seductive in nature."[266] Although the father's psychologists had testified that "most child molestation occurs between adult heterosexual males and female children,"[267] "child molestation was approximately 95% heterosexual," and that "homosexual molestation is rare,"[268] this evidence was rejected by the appellate court in strident terms. "The experts' testimony with respect to molestation

265. 643 S.W.2d 865, 867 (Mo. Ct. App. 1982).

266. *Id.* at 868.

267. *Id*. at 867.

268. *Id*.

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of minors is . . . suspect," the court found.[269] "Every trial judge, or for that matter, every appellate judge, knows that the molestation of minor boys by adult males is not as uncommon as the psychological experts' testimony indicated."[270]

In *J.L.P.(H.),* the court's articulation of the seduction fear was unusually explicit, but the father's response to the fear was quite typical. In a wide range of settings, LGBT advocates have sought to debunk the seduction fear on empirical grounds. Citing a long line of studies on sexual abuse, they have routinely claimed that "heterosexual men are overwhelmingly responsible for child abuse,"[271] "the 'vast majority of sex crimes committed by adults on children are heterosexual, not homosexual'"[272] and "children are much more likely to be sexually abused by heterosexuals than homosexuals."[273]

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269. *Id*. at 869.

270. *Id*. To provide factual support for this remarkable statement, the court observed that "[a] few minutes research discloses the following appellate decisions involving such molestation," citing seven criminal cases involving men sexually abusing boys reported between 1957 and 1978. *Id*. In addition, the court argued that the experts had not compared apples to apples: "It may be that numerically instances of molestation occur with more frequency between heterosexual males and female children, but given the statistical incidence of homosexuality in the population, which the father claims is 5 to 10%, homosexual molestation is probably, on an absolute basis, more prevalent." *Id*.

271. Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165, 176 (1998); *see also* Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two are Better than One*, 2001 U. ILL. L. REV. 1, 49 (2001); Erica Gesing, *The Fight to Be a Parent: How Courts Have Restricted the Constitutionally-Based Challenges Available to Homosexuals*, 38 NEW ENG. L. REV. 841, 860 (2004); Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981, 1027 (1991); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1629, 1639-40 (1989).

272. David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345, 360 (1994) (quoting Baker v. Wade, 553 F. Supp. 1121, 1130 (N.D. Tex. 1982)); *see also* Carlos A. Ball & Janice Farrell Pea, *Warring With Wardle: Morality, Social Science and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 307 (1998).

273. Susan J. Becker, *Child Sexual Abuse Allegations Against a Lesbian or Gay Parent in a Custody or Visitation Dispute: Battling the Overt and Insidious Bias of Experts and Judges*, 74 DENV. U. L. REV. 75, 95 (1996); *see also* Darryl

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Throughout the 1970s, the new fears of indoctrination, role modeling, and public approval were laid alongside the old fear of seduction, in a classic example of Eskridge's "sedimentation" hypothesis.[274] But during the 1980s, the fear of seduction was rapidly marginalized.[275] Whereas Bryant's campaign had freely mixed the old with the new, the coming years were dominated by more precise, restrained objections to indoctrination, role modeling, and public approval. Although the seduction fear was still advanced by litigants, it was framed in increasingly vague terms, and it was rarely relied upon by courts. Even as the country was seized by AIDS-phobia, most judges remained unwilling to accommodate the popular fear that gay fathers might infect children with HIV. While a few litigants raised allegations of child sexual abuse in custody battles, they were almost uniformly rejected by courts.[276]

In light of the long history of the seduction fear, the marginalization of this belief is one of the LGBT movement's most impressive achievements. As Suzanne Goldberg has argued, it is worth pausing to consider how this victory was accomplished.[277] In light of the LGBT movement's emphasis on empirical claims about homosexuality and child molestation, it may be tempting to

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Robin Wishard, Comment, *Out of the Closet and Into the Courts: Homosexual Fathers and Child Custody*, 93 DICK. L. REV. 401, 411 (1989) ("Studies of child molestation suggest that sexual molestation of children is much more likely to be performed by heterosexual than homosexual men.").

274. *See* Eskridge, *supra* note 5, at 1331, 1338; *see also In re* J.S. & C., 324 A.2d 90, 95-96 (N.J. Super Ct. Ch. Div. 1974); discussion *supra* Part III.A.

275. Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375, 1393-94 (2010) (noting that "the intuitive link between gay men and the sexual predation of minors is one that, while powerful in past decades, appears to have weakened in influence in response to strong empirical evidence to the contrary" and that "the argument is not made in mainstream fora").

276. *See, e.g.*, Rosky, *Like Father, Like Son*, *supra* note 188, at 293 (showing that stereotype of gay male child molester has been rejected by courts in custody and visitation cases since the 1990s). This is another example of the phenomenon that Eskridge describes as the "sedimentation" of anti-gay discourse. Eskridge, *supra* note 5, at 1331, 1338.

277. *See* Goldberg, *supra* note 275, at 1393-94.

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conclude that the empirical strategy worked, and that a similar strategy should be deployed against the newer fears of indoctrination, role modeling, and public approval. If advocates debunked the old fear with data, why not try the same tactic with the new fears? Why not argue that indoctrination, role modeling, and public approval simply don't work—children *can't* be discouraged from becoming queer—rather than taking on the more divisive question of whether children *should* be discouraged from becoming queer?

It is important to note, however, that there are a few leaps at work in this logic. First, it is not clear that the seduction fear was actually debunked by the data—or at least, not by the data alone. It seems equally plausible to assume that the seduction fear was undermined by the increasing openness of LGBT people during the 1980s, which allowed individuals to challenge the stereotype of the homosexual child molester with anecdotes—instead of, or at least, in addition to, rigorous statistical studies.[278] Second, even if the seduction fear was debunked by the data, in whole or in part, this approach may not be the best or only way to challenge the opposition's new fears of indoctrination, role modeling, and public approval.

After all, there is something unique about the seduction fear, which distinguishes it sharply from the fears of indoctrination, role modeling, and public approval. Unlike the others, the seduction fear claims that LGBT people inflict indisputable *harms* against children—the physical and psychological harms of sexual abuse—which are independent of any potential impact on children's sexual or gender development. As a result, the LGBT movement was left without any meaningful choice in formulating a response to this argument. Advocates could not say, for example, that the state had no legitimate interest in protecting children from being sexually abused.

By contrast, the new fears of indoctrination, role modeling, and public approval neither claim nor presume that LGBT people inflict any independent harms upon

278. I thank Professor Carlos Ball for this insight.

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children, other than the alleged harm of queerness itself. For this reason, the LGBT movement has other ways of responding to these fears. Rather than relying on strictly empirical claims, LGBT advocates can directly challenge the legitimacy of the state's interest in discouraging queerness, and the fundamental premise that children are better off straight.

### B. *Indoctrination: Nothing to do with Schools*

In responding to the indoctrination fear, LGBT advocates have flatly denied that LGBT people aim to "indoctrinate" children into queerness, and that the state's adoption of pro-LGBT reforms would allow LGBT teachers to "recruit" children into the LGBT "lifestyle."

In 2008, these questions took center stage in the controversy over same-sex marriage in California. In the official ballot pamphlet for Proposition 8, the law's sponsors claimed that it "protects our children from being taught in public schools that 'same-sex marriage' is the same as traditional marriage."[279] Because "[s]tate law may require teachers to instruct children as young as kindergarteners about marriage[,]" they warned, "TEACHERS COULD BE REQUIRED to teach young children there is *no difference* between gay marriage and traditional marriage."[280] They argued that public schools should not teach "our kids that gay marriage is okay," because "[t]hat is an issue for parents to discuss with their children according to their own values and beliefs."[281]

Strictly speaking, none of this language explicitly lays out the indoctrination fear. Although the pamphlet objected to the possibility of children being taught that "gay marriage is okay," or "the same as traditional marriage," it did not identify the precise effect that such lessons would

279. Ron Prentice et al., *Arguments in Favor of Proposition 8*, CALIFORNIA GENERAL ELECTION OFFICIAL VOTER INFORMATION GUIDE, voterguide.sos.ca.gov/past/2008/general/argu-rebutt8.htm (last visited May 6, 2013).

280. *Id.*

281. *Id.*

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have on children's sexual development, or offer any other reasons why they might be objectionable. But as a federal court observed in *Perry v. Schwarzenegger*, any lingering ambiguity in this message was resolved by one of the campaign's television ads, *It's Already Happened*.[282]

In this commercial, the opening scene depicted a young girl walking into her kitchen as she returned home from school:

> Girl: "Mom, guess what I learned in school today?"
>
> Mother: "What, sweetie?"
>
> Girl: "I learned that a *prince* can marry a *prince*, and *I* can marry a *princess*!"[283]

As the girl delivers this presumably dreadful news, she presents her mother with *King and King*, a children's book about the marriage of two princes. While the mother's frowning face lingers in the background, a law professor appears in the foreground to underscore the plausibility of this scenario: "Think it can't happen? It's *already* happened."[284] The professor then proceeds to describe *Parker v. Hurley*,[285] a Massachusetts case in which parents were denied the right to exempt their children from elementary school lessons that featured children's books about same-sex couples. As the ad ends, a narrator concludes: "Under California law, public schools instruct kids about marriage. Teaching kids about gay marriage *will* happen here unless we pass Proposition 8."[286]

A few weeks after this ad was broadcast, California's leading LGBT organizations aired a counterattack, *Prop 8*

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282. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010); *see also* Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 380-81 (2009) (describing television ads in support of Proposition 8).

283. *Yes On 8 TV Ad: It's Already Happened*, YOUTUBE (Oct. 7, 2008), www.youtube.com/watch?v=0pgjgqFYP4.

284. *Id.*

285. 514 F.3d 87 (1st Cir. 2008).

286. *Id.*

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*Has Nothing To Do With Schools*,[287] which sought to refute the campaign's message on empirical grounds. As the commercial begins, a narrator asks, "Have you seen the TV ads for Prop 8?"[288] while the girl and the mother from *It's Already Happened* appear in the background. "They're 'absolutely not true,'" he insists, quoting California's Superintendent of Public Schools.[289] As the scene shifts, the superintendent elaborates. Sitting on his desk in a suit, under his official title, he explains: "Prop 8 has nothing to do with schools, or kids. Our schools aren't required to teach anything about marriage. And using kids to lie about that is shameful."[290]

Within days, the sponsors of Proposition 8 responded with two ads that sought to dramatize the law's impact on public school curricula. The first ad, *Everything To Do With Schools*,[291] featured two parents from the *Parker v. Hurley* case complaining, "[a]fter Massachusetts legalized gay marriage, our son came home and told us the school taught him that *boys* can marry *boys*. He's in *second* grade."[292] The second ad, *Truth*, showed a class of first graders taking a field trip to see a lesbian teacher's wedding, and observed that the Superintendent's own website confirmed that "teaching marriage is required in 96% of schools."[293] Prop 8

287. *Prop 8 Has Nothing to Do With Schools*, YOUTUBE (Oct. 22, 2008), http://www.youtube.com/watch?v=CIL7PUl24hE. In a recent article, Professor Melissa Murray insightfully argues that the Proposition 8 advertising campaigns successfully reframed the debate over same-sex marriage in a manner that emphasized the threat of state interference with parental rights. *See* Murray, *supra*, note 282, at 359-60.

288. *Prop 8 Has Nothing to Do With Schools*, YOUTUBE (Oct. 22, 2008), http://www.youtube.com/watch?v=CIL7PUl24hE.

289. *Id*.

290. *Id.*

291. *Yes On 8 TV Ad: Everything To Do With Schools,* YOUTUBE (Oct. 20, 2008), http://www.youtube.com/watch?v=7352ZVMKBQM.

292. *Id*.

293. *Id*.

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had been polling behind for several weeks, but it passed by a margin of 52% to 48%.[294]

294. *See* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1321 (2010) (comparing public opinion polls on Proposition 8 to timing of television commercials); Mark DiCamillo, *Why Prop. 8 Confounded Pre-Election Pollsters*, S.F. CHRON., Nov. 10, 2008, at B5 ("Double-digit leads held by the 'no' side in the pre-television advertising stages of the campaign declined precipitously as the TV ad campaigns hit in mid-to-late-September.").

Of course, it is possible to imagine more sophisticated empirical challenges to the campaign's ads, but I am skeptical that they would have fared any better in the campaign against Proposition 8. For example, rather than vaguely insisting that Prop 8 had "nothing to do with schools," LGBT advocates could have searched for other ways to challenge the campaign's claims on empirical grounds. For example: Advocates could have tried to explain that *teaching* children about same-sex marriage is not the same thing as *indoctrinating* them into it, or that teaching children about same-sex *marriage* is not the same thing as teaching them about homosexual *sex*. But these distinctions seem far too nuanced to convey in a television commercial, and far too subtle to allay fears about exposing children to queerness.

More obviously, advocates could have tried to deny that children can be indoctrinated, by insisting that a teacher can't "teach" a child to become LGBT. But this strategy seems unlikely to succeed, for both strategic and empirical reasons. First, the campaign for Proposition 8 had not explicitly claimed that teachers would instruct children to be queer; instead, the campaign had claimed that teachers would instruct children "that there is *no difference* between gay marriage and traditional marriage." Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 979 (N.D. Cal. 2010). Under these circumstances, LGBT advocates would have been ill-advised to claim that children cannot be "indoctrinated," or "taught" to be lesbian, gay, or bisexual. In an attempt to rebut this argument, they would be re-introducing it—giving it more emphasis than the law's sponsors. Second, it is not clear whether LGBT advocates could have truthfully denied that children can "learn" to be *queer* from a LGBT teacher, because there is not much empirical data on this particular subject. To begin with the simplest case, there do not seem to be any empirical studies that examine whether children's sexual and gender development is affected by having an openly LGBT teacher. But even if we suppose that such a study existed, what would we reasonably expect such a study to conclude? Even if a LGBT teacher cannot "teach" a student to "become" lesbian, gay, bisexual, or transgender, it still seems plausible that an openly LGBT teacher could facilitate a student's becoming *queer* in the broader sense—for example, in the sense of admitting, accepting, and safely exploring one's homosexual desires and variance from traditional gender roles.

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C. *Role Modeling: No Differences*[295]

Over the years, the LGBT movement has articulated two responses to the role modeling fear, which closely parallel the movement's response to the seduction fear. First, they have claimed that the fear is logically absurd because the "vast majority" of lesbian and gay people were raised by heterosexual parents.[296] Second, they have claimed that the fear is demonstrably false because empirical studies have found "no differences" in the sexual and gender development of children raised by lesbian and gay parents.[297] Although numerous researchers have advanced these claims, they have not held up well to independent review.

In 2001, sociologists Judith Stacey and Timothy Biblarz published a comprehensive meta-analysis of the best-designed parenting studies, in which they found that researchers had "downplay[ed]" significant differences in the sexual development of children raised by lesbian and gay parents.[298] Although the authors were sympathetic to the cause of lesbian and gay parenting, they found evidence that some children raised by lesbian and gay parents were more likely to entertain same-sex fantasies, engage in same-sex behavior, and identify as lesbian, gay, or bisexual, and less likely to conform with traditional gender norms.[299]

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295. The first four paragraphs of this Section have been adapted, with modifications, from Clifford J. Rosky, Perry v. Schwarzenegger *and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913, 945-46 (2011).

296. Ball & Pea, *supra* note 272, at 287; *see also* Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-use of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207, 213 (1995); Flaks, *supra* note 272, at 369; Kari E. Hong, *Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 57 (2003); Kathryn Kendell, *The Custody Challenge: Debunking Myths About Lesbian and Gay Parents and Their Children*, 20 FAM. ADVOC. 21, 24 (1997); Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 651 n.158 (1996); Philip S. Gutis, *Homosexual Parents Winning Some Custody Cases*, N.Y. TIMES, Jan. 21, 1987, at C1.

297. Stacey & Biblarz, *supra* note 260, at 163.

298. *Id.* at 159.

299. *Id.*

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In particular, Stacey and Biblarz cited one study indicating that the daughters of lesbian mothers were more likely to entertain same-sex fantasies, engage in same-sex behavior, and violate traditional gender norms,[300] and another study indicating that the sons of gay fathers were more likely to identify as gay or bisexual in adulthood.[301] In 2010, they published a follow-up analysis in which they found additional evidence that the daughters of lesbian mothers were more likely to engage in same-sex behavior and less likely to identify as heterosexual, and that the sons of lesbian mothers had "greater gender flexibility" than other boys.[302]

The LGBT movement's response to these articles offers a case study in how the fear of the queer child has influenced the empirical study of LGBT parenting.[303] Opponents of LGBT rights have warmly welcomed the Stacey and Biblarz article,[304] but most LGBT advocates have studiously avoided discussing it. Rather than confronting the possibility that children exposed to queerness may be more likely to become queer, most LGBT advocates have either failed to mention the study at all, or they have glossed over the study's controversial findings about children's sexual and gender development.[305]

In contrast to legal scholars, psychologists have seemed more willing to acknowledge these findings—but they too have shown little interest in entertaining or exploring them.

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300. FIONA L. TASKER & SUSAN GOLOMBOK, GROWING UP IN A LESBIAN FAMILY: EFFECTS ON CHILD DEVELOPMENT 150-51 (1997).

301. J.M. Bailey et al., *Sexual Orientation of Adult Sons of Gay Fathers*, 31 DEVEL. PSYCHOL. 124, 124 (1995).

302. Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. MARRIAGE & FAM. 3, 14-15 (2010).

303. *See* Rosky, *Like Father, Like Son*, *supra* note 188, at 336.

304. *See, e.g.*, Lynn D. Wardle, *Considering the Impacts on Children & Society of "Lesbigay" Parenting*, 23 QUINNIPIAC L. REV. 541, 550, 561 (2004).

305. WILLIAM RUBENSTEIN, CARLOS BALL & JANE SCHACTER, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 731 (3d ed. 2007) ("Most of the responses to Wardle continued to insist that children raised by gay parents were no different than those raised by heterosexuals."); Rosky, *Like Father, Like Son*, *supra* note 188, at 336-37; Rosky, *supra* note 295, at 947.

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In 2003, Susan Golombok and her colleagues sharply criticized Stacey and Biblarz for overemphasizing differences found in only a handful of variables, while ignoring a much larger set of variables in which no differences had been found.[306] In addition, Golombok et al. observed that Stacey and Biblarz had made "no distinction" between children's gender identity and gender roles, on the one hand, and children's gender attitudes, on the other hand.[307] Within the psychological literature, they explained, "it is well-established . . . that gender identity and gender role behavior are relatively fixed and central to children's well-being and self-esteem, whereas attitudes are more open to parental influence and change."[308]

The following year, the American Psychological Association joined the fray in a series of amicus briefs filed in same-sex marriage cases. In one brief after another, the APA insisted that "*most* published studies have not found reliable differences in social gender role conformity between the children of lesbian and heterosexual mothers."[309] In a footnote, the APA acknowledged that Stacey and Biblarz had found otherwise, but they rejected most of the statistical conclusions that Stacey and Biblarz had reached: "We have reviewed the studies cited by Stacey and Biblarz, however, and only the two cited in the first paragraph of this footnote (which appear to have been derived from the same ongoing study) actually reveal significant differences in this regard."[310]

In both of these critiques, something is conspicuously absent—any discussion of children's sexual identity, desire, or behavior. Surely Golombok was aware that Stacey and Biblarz had broached the subject; she was a co-author of the

306. Susan Golombok et al., *Children with Lesbian Parents: A Community Study*, 39 DEVEL. PSYCHOL. 20, 21 (2003).

307. *Id*.

308. *Id*.

309. Brief of American Psychological Association and New Jersey Psychological Association as Amici Curiae in Support of Plaintiffs-Appellants, Lewis v. Harris, 2004 WL 5456200, at *45 (N.J. Super. Ct. Oct. 26, 2004).

310. *Id*. at n.73.

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1997 study on which they had principally relied.[311] Likewise, in the APA's amicus briefs, the possibility of children's queerness has not been acknowledged. Although the APA insists that homosexuality is not "harmful [or] undesirable,"[312] and acknowledges that the etiology of sexual orientation is "not well understood,"[313] the organization continues to reject the role modeling fear on strictly empirical grounds: "[T]he available evidence indicates that the vast majority of lesbian and gay adults were raised by heterosexual parents and the vast majority of children raised by lesbian and gay parents eventually grow up to be heterosexual."[314] The briefs do not mention that until recently, the effect of parental sexual orientation on children's sexual development had been carefully examined in only a single longitudinal study—Golombok's 1997 study—which had found statistically significant differences in the sexual ideation and behavior of children raised by lesbian mothers.[315]

The controversy continues. In 2010, two new studies cast further doubt on the empirical case against the role modeling fear. First, Henny Bos and Theo Sandfort published a study in which they found that "children in lesbian families were less certain that in the future they would experience heterosexual attraction and engage in heterosexual relationships."[316] In a remarkable sign of the times, this is precisely what the authors had hypothesized. In developing the study, they presumed that girls raised by lesbian mothers would be "less confident" about whether they would "marry a man," "have a family together with a man," "live together with a man," "have a child together

311. *See* Stacey & Biblarz, *supra* note 260, at 169, 173, 182.

312. Brief of American Psychological Association, *supra* note 309, at *46.

313. *Id*. at *47.

314. *Id*.

315. *See* Stacey & Biblarz, *supra* note 260, at 169, 173, 182.

316. Henny Bos & Theo Sandfort, *Children's Gender Identity in Lesbian and Heterosexual Two-Parent Families*, 62 SEX ROLES 114, 119 (2010).

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with their husband," and "be in love with a man," and vice-versa for boys.[317]

That same year, the United States National Longitudinal Lesbian Family Study (NLLFS) published the largest study ever conducted on children raised by lesbian mothers. As the subtitle of the paper indicated, the study was designed to measure "sexual orientation, sexual behavior, and sexual risk exposure" for "adolescents" raised in lesbian families.[318] Based on a sample of 78 seventeen-year-old children raised by lesbian mothers, the study found that none of the children had been physically or sexually abused.[319] With respect to sexual orientation, none of the 37 (0%) girls identified as homosexual, but seven (19%) identified as bisexual, and another eleven (30%) identified as "predominantly heterosexual, incidentally homosexual."[320] Of the 37 boys, the rates of homosexual and bisexual identification were much lower: two (5%) identified as homosexual, one (3%) identified as bisexual, and five 14% identified as predominantly homosexual but incidentally homosexual.[321] With respect to sexual behavior, 15% of the girls reported sexual activity with other girls, while 6% of the boys reported sexual activity with other boys. [322]

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317. *Id*. at 117-18 ("We . . . expected children in lesbian families to have less strong expectations of future heterosexual romantic involvement (higher sexual questioning).").

318. Nanette K. Gartrell, Henny M.W. Bos & Naomi G. Goldberg, *Adolescents of the U.S. National Longitudinal Lesbian Family Study: Sexual Orientation, Sexual Behavior, and Sexual Risk Exposure*, ARCHIVES OF SEXUAL BEHAVIOR 1199, 1199 (Nov. 6, 2010).

319. *Id*. at 1201.

320. *Id*. at 1204.

321. *Id*.

322. *Id*. at 1205. Because this study did not include a control group, the NLLFS researchers sought to compare these findings with national probability samples. After gathering weighted samples from the 2002 National Survey of Family Growth (NSFG), they found that only 5% of the NSFG girls had reported same-sex activity, and 6% of the NFSG boys. *Id*. Based on these figures, they reported that the NLLFS girls "were significantly more likely to have had sexual contact with other girls," but the boys were not significantly more likely to do so. *Id*. at 1202.

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When the NLLFS study was published, one of the study's funders sought to downplay the NLLFS findings on the impact of parental sexual orientation on children's sexual development. The press release announced, "New Williams Institute Report Finds 0% of Adolescents Raised by Lesbians Have Been Physically of Sexually Abused By Parent."[323] In the first three paragraphs, the release focused exclusively on the study's findings that "none of the . . . adolescents report[ed] having ever been physically or sexually abused by a parent or other caregiver."[324] In the final sentence, the release added: "On sexual orientation, 2.8% of the NLLFS adolescents identified as predominately to exclusively homosexual."[325] The release did not include any information about the sexual orientation of girls and boys, the number of children who had identified as bisexual, or the number of children who had reported sexual activity with a person of the same sex.[326]

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The NSFG survey had not asked seventeen-year-olds to identify as heterosexual, bisexual, or homosexual, so the NLLFS authors were not able to compare the rate of self-identification to a NFSG sample. But other available data indicates that the 19% rate of bisexuality observed in the NLLFS study is higher than national averages. In the 2006 NFSG data, for example, only 8% of girls aged eighteen and nineteen identified as lesbian or bisexual, and only 9% reported that they were incidentally attracted to other girls. Anjani Chandra et al., *Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data From the 2006-2008 National Survey of Family Growth*, 36 NAT'L HEALTH STAT. REP. 1, 28-29 (Mar. 3, 2011).

323. Email from Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at UCLA School of Law, Nov. 10, 2010 (on file with author).

324. *Id.*

325. *Id*.

326. *Id*. By acknowledging the uncertainties of this empirical debate, I do not mean to suggest that the role modeling fear has been proven correct. In 2010, Susan Golombok published yet another longitudinal study finding that children raised by lesbian mothers were *not* significantly more likely to identify as lesbian, gay, or bisexual. Susan Golombok & Shirlene Badger, *Children Raised in Mother-Headed Families From Infancy: A Follow-Up of Children of Lesbian and Single Heterosexual Mothers, at Early Adulthood*, 25 HUM. REPROD. 150, 155 (2010). And in 2011, one year after the NLLFS study was published, the authors updated the NFSG national probability sample by drawing on a new round of NFSG data collected between 2006 and 2008, a timeframe closer to when the NLLFS data was collected. Nanette Gartrell, Henny Bos, & Naomi

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### D. *Public Approval: Truth and Consequences*

Last but not least, there is the claim that the government's recognition of LGBT rights will send a message to children that the state and society approve of queerness, which will make children more likely to be queer. The public approval fear is rarely addressed by LGBT advocates—at least, not in so many words. In same-sex marriage cases, advocates routinely argue that the government has no ability to influence an adult's sexual orientation,[327] but they do not generally formulate this argument in terms of children or childhood.

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Goldberg, Letter to the Editor, *New Trends in Same-Sex Contact for American Adolescents?*, ARCH. SEXUAL BEHAV. 1, 1 (Dec. 15, 2011), http://www.nllfs.org/images/uploads/pdf/nllfs-letter-editor-december-2011.pdf. Based on the 2006 NFSG data, the authors found that neither girls nor boys raised by lesbian mothers were significantly more likely to engage in same-sex behavior. *Id*. at 2.

We must remember, however, that the fear of the queer child applies to gender roles, in addition to sexual orientation, gender identity, and sexual behavior. And in 2012, yet another a study of adopted children found that "[s]ons of lesbian mothers were less masculine in their play behavior," when compared to "sons of heterosexual parents," or even "sons of gay fathers." Abbie E. Goldberg et al., *Gender-Typed Play Behavior in Early Childhood: Adopted Children with Lesbian, Gay, and Heterosexual Parents*, 67 SEX ROLES 503, 503 (2012). Only time will tell which of these findings will be confirmed by future studies, and whether the evidence for a modest version of the role modeling theory will continue to build.

In addition, I recognize that there are a number of ways to explain the differences in this data without endorsing the fear that parents are serving as "role models" for children's sexual and gender development. For example, it seems plausible to ask whether the studies are capturing systemic biases in the children's reporting patterns, rather than "real" differences in children's fantasies, interests, behaviors, and identities. It may be that children raised by lesbian and gay parents are more likely to be candid with researchers, or with themselves, than children raised by heterosexual parents. Moreover, in many of these studies, the children were genetically related to at least one lesbian or gay parent, which raises the possibility that the children's sexual orientation was influenced primarily by genetic rather than environmental factors. All of these possibilities are plausible interpretations of the data, and any of them would significantly undermine the empirical case for the role modeling fear.

327. *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010) ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages."); MARTHA

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In *No Promo Homo*, Professor Eskridge provides a rare exception to this trend. Under the brave heading, *Truth and Consequences*, Eskridge frankly admits that children are the most common target of the opposition's public approval fears: "The most popular version of the no promo homo argument is that a progay shift in state policy will be a signal to the *wavering adolescent* that homosexuality is okay, and the wavering adolescent might then *choose* homosexuality as her sexual orientation."[328] In addition, he notes that opponents of LGBT rights have claimed that "progay policies will promote homosexual practices, particularly sodomy,"[329] and increase "people's willingness to be open about their homosexual orientation."[330] After registering a number of caveats, Eskridge eventually concedes that none of these claims can be resolved on empirical grounds.

When compared to the cautiousness of the LGBT movement, the candor of Eskridge's conclusion is startling:

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C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 146 (2010) ("If we were to study all recent cases of heterosexual divorce, we would be unlikely to find even a single case in which the parties [] felt that their divorce was caused by the availability of marriage to same-sex couples. Divorce is usually an intimate personal matter bearing on the nature of the marital relationship.").

328. Eskridge, *supra* note 5, at 1366. While Eskridge's willingness to engage the fear of the queer child is admirable, his initial characterization of the fear as a claim that an adolescent will "choose" to become homosexual seems problematic. Although Eskridge does not define "homosexual orientation" in this sentence, his usage indicates that he is referring to homosexual desire, rather than behavior ("practices") or identification ("openness"). Yet if this is his meaning, he has already framed the fear of public approval as a straw argument. Even the most zealous opponents of LGBT rights do not claim that the state's adoption of pro-LGBT policies will cause children to "choose" homosexual *desires*. The only "choices" that opponents imagine are the decisions to engage in homosexual *behavior* and *identify* as lesbian, gay, or bisexual. The distinction is telling, because Eskridge seems to agree with his opponents on both counts: a few pages later, he acknowledges that "engaging in sodomy is a conscious choice" and "being openly GBLT is a matter of conscious choice that state signals might affect over time." *Id*. at 1366, 1369, 1371.

329. *Id*. at 1369.

330. *Id*. at 1371.

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> Although there is no hard empirical evidence, it seems sensible that abandoning no promo homo educational policies or adopting gay-friendly ones would encourage more adolescents to be openly gay or bisexual. . . . [T]he only likely consequence—but a big one—of shifting policy in a progay direction is encouragement of more open homosexuals and more public displays of homosexual identity, and therefore of desire and practices imputed to that identity in our sex-obsessed culture. . . . If kids see two women marrying one another in a state-sanctioned ceremony, they might ask their parents about how such a marriage can be consummated, or they might engage in their own intramural speculations.[331]

Needless to say, many opponents of LGBT rights would welcome this passage as the concession that killed the LGBT movement. By admitting that the movement might "encourage more adolescents to be openly gay or bisexual," and more "kids" to engage in "intramural speculations" about same-sex relations and relationships, Eskridge seems to play directly into the public's worst fears, and the opposition's greatest strengths.

But Eskridge published this passage more than ten years ago, and the LGBT movement is alive and well. Following Eskridge's lead, this Article means to ask: if we suppose that his predictions were accurate, would the LGBT movement stand defenseless? Must LGBT advocates concede that the state has a legitimate interest in encouraging children to be straight or discouraging children from being queer?

## V. A NORMATIVE CHALLENGE

To answer these questions, this Part lays out a normative framework for challenging the fear of the queer child. It begins by acknowledging that even in the 1970s and 1980s, there were activists who questioned the widespread assumption that children should be discouraged from being or becoming queer. Rather than insisting that children's sexual and gender development could not be influenced, they asked, "*so what* if children are queer?" By posing such a provocative question, this vanguard suggested

331. *Id*. at 1371-72.

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that queerness is neither morally nor legally relevant to children's best interests. In the new millennium, this claim has been taken up by a handful of legal scholars, lawyers, and judges, reflecting a broader shift in cultural attitudes toward children's queerness. Borrowing from queer theorist Lisa Duggan's *Queering the State*, this Part conceptualizes these claims under the rubric "No Promo Hetero."[332] It insists that the government must adopt a neutral position vis-à-vis children's straightness and queerness, because it has no legitimate basis for presuming that children are better off straight.

### A. *So What If It's True?*

Even as early as Bryant's campaign, there were LGBT advocates who sought to challenge the fear of the queer child on normative grounds. One notorious example was Bob Kunst, a Dade County activist whom Bryant had accused of handing out pamphlets about homosexuality at local high schools. Throughout the campaign, Kunst brazenly admitted that Dade County's anti-discrimination law would provide lesbian and gay youth with role models—indeed, he identified himself as "an absolutely positive role model,"[333] and he claimed that providing children with gay role models was one of the law's principal benefits.[334] In a public meeting at a local church in Miami, Kunst speculated that between ten and fifteen percent of children in Dade County were already "homosexual"[335]—in his view, "people were inherently bisexual; an individual's specific sexuality was in many ways a matter of choice; the goal was to explore it."[336] He was especially fond of drawing an analogy between sexuality and ice cream flavors: "Life is like ice-cream, there's 38 flavors out there, you choose the flavor you want."[337] He described his strategy in unapologetically

332. Duggan, *supra* note 8, at 8-9.

333. CLENDINEN & NAGOURNEY, *supra* note 126, at 301.

334. FEJES, *supra* note 155, at 81.

335. *Id*. at 131.

336. *Id*. at 67.

337. *Id*. at 68.

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radical terms, arguing that activists must "'expose the root of homophobic insecurity and call it like it is' and be 'outfront all the way through, redefining same-sex and both-sex experiences in terms of the beautiful new role models they represent.'"[338] However naïve Kunst may have seemed during this era, he was not alone in making such claims. In 1981, Gore Vidal wrote in *The Nation* that "a teacher known to be a same-sexer would be a splendid role model for those same-sexers that he—or she—is teaching."[339]

Queer theory's founder, Eve Kosofsky Sedgwick, was not far behind the likes of Kunst and Vidal. In 1989, Sedgwick delivered a trail-blazing talk, *How To Bring Your Kids Up Gay: The War on Effeminate Boys*, in which she railed against society's widespread "wish that gay people *not exist*,"[340] and in particular, the lingering "desire for a nongay outcome" among childhood psychologists.[341] In the mid-1990s, Sedgwick's battle cry was taken up by a new vanguard of scholars in other fields. In 1994, psychologist Laura Benkov observed that in custody and visitation cases involving a lesbian or gay parent, both sides tacitly assumed that children should be discouraged from becoming lesbian, gay, or bisexual. Although she acknowledged that "[r]efuting the worry that children raised by homosexuals will themselves grow up to be gay was a pivotal step in the legal advocacy for homosexual parents,"[342] she emphasized that it was only the first step, because it sought to answer "homophobic questions on homophobic terms."[343] She lamented: "It seems society is not ready yet for a more deeply challenging response to the question of whether the kids of homosexuals will grow up to be gay—namely, *so what if they do*?"[344]

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338. *Id*. at 147.

339. Gore Vidal, *Some Jews and Gays*, THE NATION, Nov. 14, 1981, at 512.

340. Sedgwick, *How To Bring Your Kids Up Gay*, *supra* note 23, at 23.

341. *Id*. at 24.

342. LAURA BENKOV, REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS 62 (1994).

343. *Id*. at 63.

344. *Id*.

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Shortly after this question was posed, it was taken up by Professor Teemu Ruskola. In *Minor Disregard*, Professor Ruskola launched the legal academy's first normative attack on the fear of the queer child. Drawing on both Sedgwick and Benkov, Ruskola took direct aim at "the law's complicity in the production of the cultural fantasy that gay and lesbian youth do not exist."[345] After presenting a withering critique of the law's discrimination against gay and lesbian adolescents, Ruskola modestly proposed that "[g]ay kids deserve recognition, respect, and protection,"[346] and that "[t]he first step in the protection of gay kids must be to *see* them as gay kids; unless the law is able to name the child, it will be unable to safeguard him or her."[347]

In the new millennium, such claims have been addressed by a growing chorus of legal scholars. In 2002, Professor Kenji Yoshino wrote in the *Yale Law Journal* that "neither gay adults nor gay children will have achieved equality with their straight counterparts until the ultimate orientation of wavering children is a matter of state and social indifference."[348] The following year, Professor Carlos Ball claimed that the government has no legitimate interest in encouraging children to conform to traditional gender norms, because the state's enforcement of such norms violates the Equal Protection Clause.[349] More recently, in 2010, philosopher Martha Nussbaum began her constitutional argument for LGBT equality by invoking the example of a boy who realized that he was gay in eighth grade: "That 'terrified' gay teenager needs, and deserves, equal respect, and a sphere of liberty equal to that enjoyed by others."[350]

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345. Ruskola, *supra* note 14, at 273.

346. *Id*. at 272.

347. *Id*. at 273.

348. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 863 (2002).

349. Ball, *supra* note 231, at 732; *see also* Susan Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 131-32 (2005).

350. NUSSBAUM, *supra* note 327, at xvii; *see also id*. at xii.

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These legal arguments have seemed to reflect and reinforce a parallel trend in popular culture during the same period. In 2005, Oprah Winfrey broadcast a show that asked *When Did You Know?*, in which she interviewed a series of gay men who described how they first realized that they were gay "at age four," "at age eight," etc.[351] In 2007, Barbara Walters reported a story on *20/20* titled, "My Secret Self: A Story of Transgender Children."[352] That same year, actors Wanda Sykes and Hillary Duff were featured in a public advertising campaign aimed at teenagers, which criticized the phrase "that's so gay" as "insulting" and "offensive."[353] In 2010, columnist Dan Savage launched the *It Gets Better Project*, in which adults record videos offering reassuring advice to LGBT children who are bullied and teased by peers.[354] Most recently, the television drama *Glee* has featured gay and transgender teenagers as prominent characters,[355] the media has devoted extensive coverage to a series of suicides among LGBT youth, and the *New York Times Magazine* featured a cover story titled, *What's So Bad About a Boy Who Wants to Wear a Dress?*[356]

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351. *The Oprah Winfrey Show: When They Knew*, (Harpo Productions Nov. 17, 2005); *see also* WHEN THEY KNEW, http://www.oprah.com/spirit/When-They-Knew (last visited Apr. 19, 2013).

352. *20/20: My Secret Self: A Story of Transgendered Children*, (ABC Television Broadcast Apr. 27, 2007); *see also Parents of Transgendered 6-Year-Old Girl Support Her Choice*, ABC NEWS (Apr. 27, 2007), http://abcnews.go.com/2020/story?id=3088298&page=1.

353. Stuart Elliot, *A Push to Curb the Casual Use of Ugly Phrases*, N.Y. TIMES, Oct. 7, 2008, at B4; *see also* THINK BEFORE YOU SPEAK. DON'T SAY "THAT'S SO GAY.", http://www.thinkb4youspeak.com (last visited Mar. 29, 2013).

354. Brian Selter, *Campaign Offers Hope to Gay Youths*, N.Y. TIMES, Oct. 19, 2010, at A16; *see also* IT GETS BETTER PROJECT, http://www.itgetsbetter.org (last visited Apr. 19, 2013).

355. Brian Selter, *Gay on TV: It's All in the Family*, N.Y. TIMES, May 9, 2012, at A1.

356. Ruth Pawader, *What's So Bad About a Boy in a Dress?*, N.Y. TIMES MAG., Aug. 8, 2012, www.nytimes.com/2012/08/12/magazine/whats-so-bad-about-a-boy-who-wants-to-wear-a-dress.html?pagewanted=a118_r=0.

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B. *Legalizing Children's Queerness*

To be sure, trends in academia and popular culture do not always translate rapidly or readily into law. Increasingly, however, there are signs that lawyers are more willing to challenge the government's interest in encouraging children to be straight, and judges are more willing to entertain these claims in challenges to policies that discriminate against LGBT people.

In *Lawrence v. Texas*, attorney Paul Smith argued the case for John Lawrence and Tyron Garner, two men who had been convicted under a Texas sodomy law, before the United States Supreme Court.[357] In his opening argument, Mr. Smith told the Justices that even when acts of sodomy were not criminally prosecuted, laws against sodomy were often invoked to justify discrimination against lesbian and gay people in other settings: "[T]hey're denied visitation to their own children, they're denied custody of children, they're denied public employment[, and] [t]hey're denied private employment.[358] In response, Chief Justice Rehnquist asked Smith whether his argument could be used to challenge a preference for heterosexual teachers: "If you prevail, Mr. Smith, and this law is struck down, do you think that would also mean that a State could not prefer heterosexuals to homosexuals to teach kindergarten?"[359]

Smith had prepared for general questions about how legalizing sodomy would affect children's sexual development, but he had not anticipated this particular question about the constitutionality of discrimination against gay teachers.[360] He cleared his throat,[361] and for a moment, he seemed to grasp for a way to distinguish between the two policies. "I think the issue of—of preference

357. *See* Oral Argument, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102) (as transcribed by the author).

358. *Id*. at 20.

359. *Id*.

360. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS: HOW A BEDROOM ARREST DECRIMINALIZED GAY AMERICANS 230 (2012).

361. *Id.* at 231.

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in the educational context would involve very different criteria, Your Honor, and very different uh, uh—considerations."[362] Regaining his footing, he modestly proposed that "the State would have to come in with some sort of a justification."[363]

Taking up Smith's challenge, Justice Scalia gamely argued that the state's justification would be "the same that's alluded to here, disapproval of homosexuality."[364] Smith replied, "Well, I think it would be highly—, highly problematic, such a—justification . . . if that were the only justification that could be offered, there was not some showing that there would be any more concrete harm to the children in the school."[365] Now that the tables had turned, it was Justice Scalia who seemed to struggle to express himself in appropriate terms: "Only that the children might—might—might be induced to, uh—to, to—to, to follow the path of homosexuality."[366]

Given that Justice Scalia is rarely at a loss for words, the pauses in this sentence seem especially significant. In 1978, then-Justice Rehnquist had colorfully compared the contagiousness of homosexuality and measles,[367] but by 2003, Justice Scalia was uncomfortable speaking in such strident terms. Rather than suggesting that a gay teacher would "seduce," "indoctrinate," or "recruit" children into homosexuality, he felt compelled to articulate the fear of the queer child in more neutral terms. But in another sign of the times, Justice Scalia's attempt at subtlety did not seem to pay off with the spectators. As soon he proffered the theory that "the child might be induced to follow the path of

362. Oral Argument, *supra* note 356.

363. *Id*.

364. *Id*.

365. *Id*.

366. *See* Ratchford v. Gay Lib, 434 U.S. 1080, 1084 (1978) (Rehnquist, J., dissenting).

367. *Id*.

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homosexuality," the noises from the gallery were audible: some laughed; others groaned.[368]

Of course, Paul Smith did neither; he did not have such luxuries. He could have replied that Justice Scalia's claim was absurd because homosexuality was not a "path," or anything that a child would learn to "follow" simply by taking kindergarten classes from a gay teacher. But as Smith later explained, he did not want to get himself mired in "complicated questions of whether sexual orientation is genetic or developed, chosen or unchosen, fixed or immutable."[369] At the same time, however, he did not want to concede that Justice Scalia's claim was factually valid, or that the state could legitimately prefer heterosexuals as kindergarten teachers.[370]

Instead of challenging Justice Scalia on empirical grounds, Smith replied that the logic of his argument was effectively circular, because it was based on nothing more than animus against lesbian and gay people:

> Well, I—I think the State has to have a greater justification for its discrimination than we prefer pushing people towards heterosexuality. That amounts to the same thing as disapproval of people's choices in this area and there has to be a more—more reasons and justifiable distinction than simply we prefer this group of people, the majority, instead of this group of people, the minority.[371]

The year after *Lawrence* was decided, Smith's argument was taken up by Judge Rosemary Barkett, in her dissent from the Eleventh Circuit's decision to uphold Florida's ban against lesbian and gay adoptions:

> [T]he panel suggests that placing children with homosexual parents may make it more likely that children will become homosexual, referring cryptically to the "vital role that dual-gender parenting plays in *shaping sexual and gender identity* and in providing heterosexual role modeling." In our democracy,

368. *Compare* YOSHINO, *supra* note 100, at 106, *with* CARPENTER, *supra* note 360, at 231.

369. CARPENTER, *supra* note 360, at 230.

370. *Id*.

371. Oral Argument, *supra* note 356, at 21.

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> however, *it is not the province of the State, even if it were able to do so, to dictate or even attempt to influence how its citizens should develop their sexual and gender identities*. This approach views homosexuality in and of itself as a social harm that must be discouraged, and so demeans the dignity of homosexuals, something that *Lawrence* specifically proscribes.[372]

Most recently, the litigation over California's Proposition 8 produced an opinion that offers the most hopeful sign that the fear may finally be falling into judicial disfavor. In *Perry v. Schwarzenegger*, Chief Judge Vaughn Walker invalidated Proposition 8, the California ballot initiative that banned same-sex couples from marrying.[373] During the *Perry* trial, the sponsors of Prop 8 sought to show that they had organized the initiative "to protect our children from learning about same-sex marriage in school," but they declined to explain why children should be protected from learning about this particular subject.[374] In his ruling, Judge Walker rejected this concern as a pretext for another fear—the fear of the queer child—which he noted the sponsors had not been willing to articulate in court.[375] In his factual findings, he determined that the Prop 8 campaign had "insinuated that learning about same-sex marriage could make a child gay or lesbian and that parents should *dread* having a gay or lesbian child."[376] He returned to this theme in his legal analysis, insisting that the campaign "played on a *fear* that exposure to homosexuality would turn children into homosexuals and that parents should *dread* having a gay or lesbian child."[377]

To support these findings, Judge Walker cited to the campaign commercial *It's Already Happened*, noting that the advertisement portrays a "mother's expression of horror upon realizing her daughter now knows she can marry a

372. Lofton v. Sec'y of Dep't of Children & Family Servs., 377 F.3d 1275, 1300 (11th Cir. 2004) (Barkett, J., dissenting) (emphasis added) (citation omitted).

373. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 988, 1003 (N.D. Cal. 2010).

374. *Id.* at 1003.

375. *Id.*

376. *Id*. at 988 (emphasis added).

377. *Id*. at 1003 (emphasis added).

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princess."[378] Drawing on the testimony of historian George Chauncey to place the campaign advertisements in "historical context," he found that the ads "echo[ed] messages from previous campaigns to enact legal measures to disadvantage gays and lesbians" by drawing on the same "fear-inducing messages."[379] As Judge Walker explained, "[t]he campaign relied heavily on negative stereotypes about gays and lesbians and focused on protecting children from inchoate threats vaguely associated with gays and lesbians."[380]

In his legal analysis, Judge Walker never fully clarified whether he rejected these fears on factual or legal grounds, though he seemed to rely on an unspoken combination of both factors. On the one hand, he found that "[t]he evidence at trial shows those fears to be completely unfounded";[381] on the other, he reasoned that "[m]oral disapproval alone is an improper basis on which to deny rights to gay men and lesbians."[382] Yet by labeling the opposition's concerns about children's sexual development as "fear," "dread," and "horror"—and by linking them to older, discredited stereotypes that portrayed lesbians and gay men as child molesters—he strongly implied that the state had no legitimate interest in encouraging children to be straight or discouraging them from being queer.[383]

### C. *Theorizing No Promo Hetero*

The question remains how to develop this promising trend into a normative challenge to the fear of the queer child—a broad principle that can be translated into liberal theory and legal doctrine, and applied to the full panoply of anti-LGBT policies that the fear has been invoked to defend. The constitutional questions are too numerous and complex

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378. *Id*.

379. *Id*.

380. *Id*.

381. *Id*.

382. *Id*.

383. *Id.*

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to broach here,[384] but the underlying theoretical principle can be briefly summarized.

Nearly twenty years ago, in her essay *Queering the State*,[385] queer theorist Lisa Duggan proposed a novel way for the LGBT movement to answer the opposition's "No Promo Homo" campaigns. Rather than insisting that homosexuality was innate or immutable, she urged queer activists to launch a "No Promo Hetero" campaign—a comprehensive attack against the state's promotion of heterosexuality through public institutions, policies, and practices.[386]

To challenge the fear of the queer child on normative grounds, this Article adopts Duggan's conceptualization of No Promo Hetero, emphasizing a few particulars that are especially relevant. First, it stresses that No Promo Hetero applies to *children*, not only to adults.[387] Although Duggan attacks the state's promotion of heterosexuality in any and all settings, this Article has shown that the phenomenon is especially rampant in childhood, and the opposition's rhetoric often trades on the idea that children are especially vulnerable to the dynamics of indoctrination, role modeling, and public approval. Given the particular anxieties that attend children's sexual and gender development, it seems

384. Part III of this Article offers a hint of these complexities. For decades, opponents of LGBT rights have used the fear of the queer child as a kind of an all-purpose tool, a justification for all manner of anti-LGBT policies. In some cases, it has been invoked to justify policies that aim to directly target children's queerness, such as rules that prohibit students from attending a school dance with a same-sex partner, wearing gender variant clothes while attending school, and advocating for LGBT rights. In many more cases, the fear has been invoked to justify policies that seek to indirectly target children's queerness, such as laws against same-sex sodomy, marriage, and adoption, or policies against hiring gay teachers, among other role models. To assess the fear's legitimacy as a justification in all of these settings, advocates will have to consider whether the state has any legitimate interest in discouraging children's queerness—in any settings, and under any circumstances. In a forthcoming article, I examine this question in detail. *See* Clifford J. Rosky, *No Promo Hetero: Children's Right to be Queer*, 35 CARDOZO L. REV. (forthcoming 2013), *available at* https://papers.ssrn.com/*sol3/papers.cfm?abstract_id=2221404*.

385. Duggan, *supra* note 8.

386. *Id*. at 8-9.

387. *Id.*

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valuable (if not vital) to respond to these fears by specifically attacking the state's promotion of heterosexuality in children and childhood.[388]

Second, this Article notes that No Promo Hetero bars the state from promoting more than just "Hetero." Alongside Duggan's objection to the state's promotion of heterosexuality,[389] this Article adds a parallel challenge to the state's promotion of gender conformity. Given that in recent years, the fear of the queer child has shifted noticeably toward attacks on gender variance in childhood, it seems useful to emphasize that No Promo Hetero and No Promo Trans must go hand in hand.[390] So although "No Promo Hetero" is catchy, one must remember that "Hetero" is shorthand for a broader concept like "heteronormativity" or "straightness," and for a broader principle that the state may not discourage children from being or becoming queer.

Finally, this Article clarifies that No Promo Hetero bars the state from doing more than just "Promo." In addition to prohibiting the state from encouraging children' straightness, it bars the state from *discouraging* children's queerness. Although this corollary was clearly implied by Duggan's argument, it is worth clarifying this principle as a matter of theory and law. Because straightness and queerness are not mutually exclusive—think of bisexuality and asexuality—encouraging one and discouraging the other are not necessarily equivalent. Yet both objectives are

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388. This suggestion parallels my amendment to Eskridge's No Promo Homo framework and is justified by the same reasoning. *See* discussion *supra* Part III.A.

389. In her essay, Duggan often invokes the terms "heterosexuality" and "heteronormativity" alongside each other. *See, e.g.*, Duggan, *supra* note 8, at 9-11. Although she explicitly borrows the term "heteronormative" from Michael Warner, she does not articulate a distinction between heterosexuality and heteronormativity, nor does she specifically refer to the promotion of gender conformity in her argument. *Id*. at 14 n.14. Given that anti-LGBT rhetoric has recently shifted back toward an emphasis on children's gender deviance, it seems useful to emphasize that the principle prohibits the state from encouraging children to conform with traditional gender norms.

390. *See* discussion *supra* Part I.B.2; *see also* Appleton, *supra* note 349, at 131-32; Ball, *supra* note 231, at 694; Sedgwick, *How To Bring Your Kids Up Gay*, *supra* note 23, at 20.

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based on normative assumptions about the virtues of straightness and the vices of queerness, which cannot be untangled from one another. Under a regime of No Promo Hetero, the state is foreclosed from pursuing either of these dubious goals.

With these adjustments in mind, this Article's normative challenge can be boiled down to a single sentence: *the state may not encourage children to be straight or discourage children from being queer*. Even if the fear's empirical premise were correct—even if exposing children to queerness will make them more likely to be queer—this fact would not be morally, legally, or politically relevant. The government has no legitimate interest in discouraging queerness in childhood, because it has no interest in discouraging queerness at any age.

## CONCLUSION

In one form or another, the fear of the queer child has been with us for centuries, if not millennia. For most of this history, it was expressed only in sexual terms, as a claim that children would be seduced into queerness. During the 1970s, the fear was refined and reformulated by opponents of LGBT rights, in reaction to the early gains of the LGBT movement. Alongside ancient fears of seduction, opponents added the seemingly kinder, gentler fears of indoctrination, role modeling, and public approval.

With only a few exceptions, the LGBT movement has responded to all of these fears with a common cry: Advocates have claimed that the fear is empirically false, because children's sexual orientation and gender identity are fixed early in life and cannot be learned, taught, chosen, or changed. In recent years, however, this empirical paradigm has seemed to exhaust itself, as advocates run up against the inherent limitations and uncertainties of the perennial debate over nature and nurture.

Thanks to the LGBT movement's remarkable progress, a new paradigm has begun to percolate among activists, experts, and litigators. This Article argues that the time has come for LGBT advocates to supplement the movement's panoply of empirical challenges with a new set of normative challenges to the premise that children's queerness is

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harmful, immoral, and inferior. Without calling upon the state to celebrate children's queerness, LGBT advocates should argue that the government has no legitimate interest in encouraging children to be straight or discouraging children from being queer. The fear of the queer child cannot be a rational justification for anti-LGBT policies, because encouraging straightness and discouraging queerness are not among the government's legitimate goals.

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